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No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. (a) Should a State be treated like any other commercial entity for antitrust standing purposes when the State's role, and the injury to the State found by the jury to have been caused by the defendants' anticompetitive conduct, directly implicated not simply commercial but also sovereign interests of the State?

(b) Should an antitrust plaintiff be denied standing because it was not a direct participant in the market restrained, as the court below held, contrary to this Court's rejection of such a "black-letter rule" in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983)?

2. Is a pattern of litigation activity protected by the *Noerr-Pennington* doctrine as a matter of law so long as it was motivated *in part* by a genuine desire to obtain judicial relief, as the court below held, contrary to this Court's recent express rejection of that absolutist position in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 108 S. Ct. 1931, 1938 (1988)?

3. Under the Seventh Amendment to the United States Constitution, may a Court of Appeals overturn a jury's determination that a pattern of litigation activity is a sham and that such activity harmed the plaintiff, when the record is replete with evidence supporting the jury verdict?

PARTIES TO THE PROCEEDINGS

Petitioners before this Court and plaintiffs-appellees below are the State of South Dakota and the South Dakota Conservancy District, an agency of the State of South Dakota. Respondents and defendants-appellants below are Kansas City Southern Railway Company and its parent, Kansas City Southern Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners the State of South Dakota and the South Dakota Conservancy District (collectively "the State" or "South Dakota") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on June 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 880 F.2d 40 and is reprinted in the appendix hereto ("App.") at 1a. An Order was issued by the Court of Appeals amending its opinion on August 8, 1989; that Order is reprinted at App. 35a. The pertinent opinion of the District Court are unreported and are reprinted at App. 38a, 56a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1989. App. 33a. A petition for rehearing with suggestion for rehearing en banc was timely filed on July 11, 1989, and denied on August 8, 1989. App. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982), provides in pertinent part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * *."

The Seventh Amendment to the United States Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

In the early 1970's, Energy Transportation Systems, Inc. ("ETSI"), a joint venture, sought to design, finance and construct a 1200-mile pipeline from the Powder River Basin coal fields in Wyoming to electric utilities in the south central United States. The pipeline would ship coal slurry, which is a mixture of 50 percent crushed coal and 50 percent water. The ETSI project would have introduced the first non-railroad mode of coal transportation

into the region and saved electric consumers over $900 million.

The guarantee of a sufficient long-term, uninterruptible water supply was an essential prerequisite to the project, and South Dakota had a direct interest in that prerequisisite. At the time, the State had two serious water problems. One was a shortage of quality drinking and livestock water in the western half of the State. The other concerned whether the ETSI project would divert much-needed ground water from the State. This second problem caused South Dakota to oppose the initial ETSI proposal. A modified proposal to run a water pipeline from South Dakota's Oahe Reservoir across the State to join with the ETSI pipeline in eastern Wyoming, where the water would be mixed with coal, resolved both problems. The proposed Oahe Reservoir pipeline would provide water to ranchers, farmers, communities, and energy industry users, as well as to ETSI. Money realized from the industrial sales of water would finance the delivery systems to western South Dakota communities and to other state water projects.

In 1981 South Dakota secured passage of legislation authorizing a permit which could be assigned to ETSI for Oahe Reservoir water. After this permit was granted, South Dakota and ETSI entered into a long-term contract under which the Oahe Reservoir permit was transferred to ETSI, and ETSI agreed to provide, at no cost, excess capacity in the water pipeline for domestic and livestock needs in western South Dakota, and to pay the State a minimum of $450 million over a term of 50 years.

For 10 years, until the whole project was killed as a result of the anticompetitive and illegal acts that formed the basis for this lawsuit, the State of South Dakota played a vital role in the development of the project. Among other things, the State:

• saw legislation introduced, passed, and vetoed, and then new legislation passed in a special session of the

Legislature which changed the law to allow the project to go forward;

• extended powers of eminent domain for transportation of water utilized by out-of-state coal slurry pipeline projects;

• through its Governor discussed the project with neighboring States, affected cities, and Indian Tribes;

• negotiated with ETSI to ensure water development, quality drinking water, and to provide sales taxes, South Dakota's principal source of revenue, from the pipeline construction;

• provided a water permit pursuant to contract, and passed legislation to allow ETSI's use of tax-free bonds;

• filed an original lawsuit in this Court in order to establish that Oahe Reservoir water could be marketed;

• sought the assistance of Attorneys General in western States in support of South Dakota's position in the *Andrews* litigation, discussed below;

• through its Conservancy subdistricts, which were established to facilitate water development within the State, supported the ETSI project as part of the development of an 11-county area, performed a cost study of the water pipeline from the Oahe Reservoir, and passed appropriate resolutions relating thereto;

• through its Water Management Board and its Department of Water and Natural Resources held hearings on affected water rights;

• provided comments to a federal agency on the environmental impact of the project, conducted feasibility studies, reviewed United States geological survey reports, and supported a federal water service contract to ETSI;

• formed a Task Force to deal with water marketing issues;

• created a Water Facilities Construction Fund in which ETSI payments were deposited and the money from

which was used to finance water development projects and resource studies;

• made application for one federal water contract that only a public body could apply for;

• met with ETSI to design and assign the location of taps for West River communities from the water pipeline;

• requested and achieved an amendment to the ETSI contract to allow South Dakota's western communities additional time to determine where distribution taps would be located; and

• defended the state water permit that was assigned to ETSI. *In re South Dakota Water Management Board*, 351 N.W. 2d 119 (S.D. 1984).

According to evidence later introduced at trial, respondents Kansas City Southern Industries and The Kansas City Southern Railway Company (jointly "KCS") conspired with other railroads to defeat the ETSI pipeline. KCS considered this project to be a serious threat as a nonrail competitor.

The railroads' opposition consisted of a group boycott to deny ETSI crossing rights and a pattern of sham litigation that abused the administrative and judicial processes in local, state, and federal forums. Delay was a critical objective of the conspiracy. Construction on this $3 billion capital-intensive construction project could not begin until all major permits were secured. Delay increased escalating multimillion capital expenditures and created risks of uncertainty as to delivery by ETSI to utility customers, who were intending to expend millions of dollars on modifications to their plants to allow coal slurry to be burned. Delay also helped maintain the railroads' monopoly profits from hauling coal to the utility customers.

For over 10 years KCS carried out many acts in furtherance of the conspiracy, some aimed directly at South Dakota, even though KCS had no tracks and no presence

in the State. Eventually, KCS succeeded in having South Dakota's contract with ETSI cancelled and the pipeline project killed.

The State cannot even begin to summarize here the many acts taken by the railroads to thwart the ETSI pipeline project. A few examples will have to suffice.

KCS first conspired with other railroads to deny permits needed by ETSI to cross railroad right of ways. Faced with this group boycott, ETSI found "windows," which were areas where the railroads had only easement interests. When ETSI purchased rights from abutting fee owners and began to obtain the crossing rights in quiet title actions, the railroads resisted and intentionally prolonged those suits for as long as 5½ years. The intentional delay occurred despite the railroads' recognition that there was no legal ground for opposition. Delay, not success, was the object.[1] In all, ETSI was forced to file 69 "window" suits, including one in South Dakota; ETSI was successful in all of them.

Another part of the railroads' strategy was to oppose on every possible front the required environmental impact statement ("EIS"). The railroads' object was to make the environmental evaluation as difficult as possible and hopefully to bog down the process. SA 1001. KCS even contrived not to disclose fully its objections to the

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[1] As one KCS attorney wrote, KCS should settle its window litigation unless its "policy is going to remain the same, *i.e.*, delay every way we can their obtaining permits or grants for construction of [ETSI's] lines * * *." KCS App. 645. One railroad employee wrote that "if we take a chapter from the environmentalists, there are many situations where litigation can hold up new projects." Ex. 693. A railroad attorney noted that "our original idea * * * was to create another roadblock in the Commission to afford the railroad industry an opportunity to further delay pipeline construction." SA 1052.

"KCS App." refers to KCS's Appendix in the Eighth Circuit. "SA" refers to South Dakota's Separate Supplemental Appendix in the same court.

EIS before the Bureau of Land Management solely to preserve judicial remedies and thereby ensure further delay. KCS App. 609.

In addition to the EIS challenge, virtually every significant permit needed by ETSI was targeted and challenged, dozens of baseless claims were asserted, and with one exception (discussed below), not one was successful. One local commission member was told that if the commissioners did not delay the permitting process, they could be held personally liable. SA 219-221.[2] KCS filed notices of intent to sue on some permits even before the EPA had acted on them, SA 1197, 1199, and it sent letters to authorities in South Dakota alleging that the Oahe pipeline in South Dakota would transport hazardous wastes, when in fact it would transport only water.

Challenges were made at every administrative[3] and judicial level, and the resultant delays were bragged about internally. SA 1106; *see also* KCS App. 725. Since they lacked standing to assert many of the claims they were making, others were solicited to participate, and their participation underwritten.

Concurrently, the railroads devised a strategy to prevent ETSI from obtaining a secure water source. For example, they spread falsehoods to downstream States about an alleged violation of (nonexistent) interstate compacts. SA 985-988. With KCS as the spearhead, the railroads stirred up opposition and guided parties through state and federal water permit hearings and litigation in South Dakota so as to ensure lengthy appeals in the courts.

KCS filed a complaint against the Federal Government in 1982 containing more than 20 separate causes of ac-

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[2] This intimidation obviously was not protected by the *Noerr-Pennington* doctrine discussed *infra*. Yet such conduct was not even discussed by the Eighth Circuit.

[3] One such agency termed their written comments not only "puzzling" but "frivolous." SA 233 236; *see also* KCS App. 239.

tion in the so-called *Andrews* litigation. As KCS planned this litigation, its executives recognized that it "may achieve delay and nothing more" and that "no one asserts a high level of confidence that we would ultimately prevail in the legal arena, once the delays have been exhausted." KCS App. 755. Despite this recognition, one chief executive ordered, "continue to fight." *Id.*

KCS obtained only a partial measure of success.[4] Of the more than 20 claims raised, the District Court ruled on only one, the authority of the Bureau of Reclamation to contract for water service, in a manner unfavorable to ETSI.[5] *Missouri* v. *Andrews*, 586 F. Supp. 1268 (D. Neb. 1984), *aff'd*, 787 F.2d 270 (8th Cir. 1986), *aff'd sub nom. ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988). Even on this issue, however, the District Court ruled that KCS had no standing, and the relief was granted in favor of other parties.

The railroads were wholly successful, however, in destroying the ETSI project. After spending $140 million, ETSI terminated the project and cancelled the South Dakota contract, citing the prolonged railroad opposition. SA 1248-49. The continued railroad harassment simply made the $3 billion project too risky for investors and backers. The cancellation vitiated all of the sovereign acts taken by the State and deprived the State of tax revenues and $200 million of ETSI payments in present value dollars. Also lost was the opportunity for the State to provide high quality drinking water at a reasonable cost to many of the State's citizens and funding for much needed other state water projects.

In 1983, South Dakota brought this suit against KCS, alleging (1) that KCS and others had conspired in viola-

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[4] A second lawsuit was filed by Missouri, Iowa and Nebraska, and the suits were consolidated.

[5] ETSI thereafter worked with South Dakota to obtain a water service contract from the Corps of Engineers consistent with the District Court decision. SA 187, 315-316, 325-327.

tion of Section 1 of the Sherman Act to prevent the development and operation of the ETSI project and to prohibit the use and shipment of Oahe Reservoir water necessary for the pipeline's operation,[6] and (2) that KCS had violated South Dakota law by intentionally interfering with contractual relations between South Dakota and ETSI.

The trial lasted 10 weeks. The jury was instructed on all elements of Section 1 and intentional interference with contractual relations. It was also instructed on the difference between sham activities and those legitimately protected under the *Noerr-Pennington* doctrine.[7]

The jury unanimously returned a special verdict finding that KCS violated Section 1 and intentionally interfered with South Dakota's contract. It awarded $200 million in lost contract payments, $10.9 million in lost tax revenues, $8.3 million in prejudgment interest, and $25 million in punitive damages. The District Court overruled all of KCS's post-trial motions. It previously had held that South Dakota had standing because it suffered the direct, foreseeable type of injury the antitrust laws were intended to redress. App. 51a-53a, 61a.

The Court of Appeals disagreed, reversed, and ordered the cause dismissed. It held that because the State was not itself a competitor in the coal transportation market, it could not seek redress under the antitrust laws for the harm it suffered at the hands of KCS. App. 15a-16a, 19a-20a. The court also dismissed the tort claim because KCS was "successful' in the *Andrews* litigation, it was deemed to have genuinely sought judicial relief, and therefore the sham exception to *Noerr-Pennington* did not apply as a matter of law. The court held that "whether [KCS]

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[6] The other railroads involved in the conspiracy were named as co-conspirators. One of them subsequently settled with the State rather than be faced with a separate suit.

[7] For examples of these jury instructions, see App. 71a.

also possessed anticompetitive motives is irrelevant." App. 29a.[8]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A RECENT DECISION OF THIS COURT AND AGGRAVATES CLEAR CONFLICTS AMONG THE CIRCUITS ON THE TESTS FOR ANTITRUST STANDING

A. The Lower Court Failed To Consider The Special Status Of A Sovereign State

The court below held that "the State of South Dakota has no standing to sue KCS for alleged antitrust violations." App. 20a. The court treated the State as if it were just another supplier to the victim of an antitrust conspiracy. In so doing, the court disregarded the fact that KCS targeted significant overt acts against the State. It also ignored the fact that the State played a far larger role in the ETSI venture than the ordinary private vendor would. South Dakota took major steps in its sovereign capacity to make the ETSI venture possible, and the State sought to obtain not only commercial but broad social benefits for the welfare of its people. The steps taken by South Dakota were those only a State could take, and the interests it asserted and protected were those for which no private party could possibly be respon-

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[8] In a consolidated companion case in Texas, KCS settled with ETSI and utility plaintiffs for $82 million. ETSI then obtained a directed verdict in its favor on the issue of conspiracy in a Sherman Act Section 1 lawsuit against one of KCS's alleged co-conspirators. Thereafter, a jury returned a verdict in ETSI's favor in the amount of $345 million, before trebling. *ETSI Pipeline Project* v. *Burlington Northern, Inc.* (E.D. Tex., May 8, 1989), *appeal pending* (5th Cir., No. 89-2561).

sible. Under the circumstances, to treat South Dakota as just another litigant ignores the special status that the States occupy under the Constitution.

This Court decided seventeen years ago that the antitrust laws do not provide a remedy for injuries *solely* to the sovereign interests of a State. *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 265 (1972). South Dakota, however, does have commercial as well as sovereign interests to vindicate in this case. It would be perverse, however, to read the *Standard Oil* case as authority for the proposition that the sovereign involvement of a State is entirely irrelevant in determining whether it has standing to complain. If that were true, a court would have to ignore matters that bear directly on the magnitude and scope of the harm.

South Dakota hardly played a passive role throughout the years when ETSI was attempting to construct the pipeline. To the contrary, its participation was required, and that participation necessitated an entire series of sovereign decisions and acts. *See supra* at 3-5. These sovereign actions were thwarted by the illegal conduct of KCS and other railroads, and some of that conduct was specifically directed at the State of South Dakota.

KCS's campaign to destroy competition from the ETSI coal slurry pipeline not only deprived South Dakota of the benefits from the ETSI contract, but also deprived the State of the opportunity to participate in other similar ventures and to develop its resources for its citizens. South Dakota's former Governor summarized these grave effects:

> We lost the ability to develop South Dakota in water resources. We lost water for western South Dakota, good water, free water, from the Missouri River. Those are the two things that we lost. [KCS App. 219.]

He testified that the State was never again able to sell water, nor did it receive further coal slurry propo-

sals.[9] In other words, KCS did not just kill a single market opportunity for the State but instead destroyed an entire market and thereby frustrated the ability of a sovereign State to develop its resources for the benefit of its citizens.

Vindication of South Dakota's interests would not require the kinds of speculative calculation that deterred recognition of a remedy in *Standard Oil*; the damages are easy to compute—as the jury did—and they do not duplicate the damages of ETSI or anyone else. Because of the significant and readily identifiable damage done to a sovereign State by violations of the antitrust laws, this Court should review the judgment below which denies that State a remedy.

As explained above, *Standard Oil* does not preclude consideration of the special status of a sovereign State in assessing the standing of that State to vindicate its commercial interests. The point is that the status of a State *broadens* the scope of its commercial interests deserving of protection under the antitrust laws. However, to the extent that language in *Standard Oil* could be read to prohibit standing by a State in circumstances like those obtaining here, we respectfully request the Court to reconsider that language.

Such reconsideration would be both warranted and timely. For a variety of reasons, the Federal Government has not enforced the antitrust laws as actively as it once did. It therefore is imperative that the States be allowed a more significant role in guarding against the detrimental effects of antitrust violations on all their interests—including proprietary activities, processes, commercial interests, sovereignty, and interests beyond those of any single citizen or group of citizens. And in this case, as well as throughout the western United States, there could be no interests more vitally in need of protection than

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[9] Janklow Trial Tr., Vol. I, p. 113.

those of water rights, the very life-blood of the State's citizens.

B. The Lower Court Treated A Single Issue—Participation In The Market—As Decisive, And Ignored Other Significant Factors

Whether or not South Dakota is to be treated like any other litigant, the court below committed clear error in giving decisive effect to its finding that South Dakota did not participate in the coal transportation market. This emphasis on a single factor is contrary to the most recent mandate of this Court in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), and is also contrary to the tests applied in other Circuits.

In *Associated General Contractors*, this Court emphasized that antitrust standing is a fact-intensive inquiry and that it is "virtually impossible to announce a black-letter rule that will dictate the result in every case." *Id.* at 536. Direct participation by the plaintiff in the restrained market may be an important factor, to be sure, but it is not decisive.[10] This factor is important primarily because it will shed light on the underlying issue that is really important: namely, whether the plaintiff's interests would be served or disserved by enhanced competition in the market." *Id.* at 539. Obviously, antitrust litigation may produce perverse results if potential plaintiffs do not have a genuine interest in preserving competition. *Cf. Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). No such risk is present here.

The court below gave no consideration to the fact that South Dakota had a vital interest in the preservation of

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[10] *See Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 472 (1982) (the statute " 'does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers' ") (quoting *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

competition in the market for the transportation of coal —an interest identical to that of ETSI itself. Only if the coal transportation market were opened to competition from coal slurry pipelines could ETSI and South Dakota benefit. When the potential competition of a coal slurry pipeline was destroyed by the actions of KCS and others, South Dakota was deprived of significant revenues and an important opportunity to develop its water resources for the benefit of its citizens.

Contrary to the characterization in the opinion below, South Dakota was not simply one more supplier of material to the ETSI pipeline. South Dakota's role was so critical that even KCS's counsel concluded that as a result of the State's contract with ETSI, "ETSI has thus initially resolved the worst problem coal slurry pipelines face: the availability of water." SA 1116. Cancellation of the contract was therefore not only "inextricably intertwined with the injury" to the relevant market,[11] but ultimately became a principal objective of KCS's campaign against competition. In these circumstances, it was clear error for the Court of Appeals to find that the injuries suffered by the State "were 'purely an incidental result of anti-competitive activity in another segment of the economy * * *'." App. 18a-19a (citation omitted).

It was similarly absurd for the lower court to conclude:

> The loss of [South Dakota's] future revenues clearly flowed from the cancellation of the contract rather than from injury to competition in the market in which it was involved. * * * It is evident that South Dakota would have suffered an identical loss in the event that the railroads had done nothing and ETSI had simply decided to terminate the SDCD/ETSI contract for some other reason. [App. 19a.]

Of course the cancellation of the contract was the imminent cause of South Dakota's injury, but the destruc-

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[11] *McCready*, 457 U.S. at 484.

tion of competition for coal transportation is what caused the cancellation. A simple hypothetical will demonstrate the fallacy of the lower court's approach. If a dealer were wrongfully terminated because of an illegal conspiracy between his supplier and a rival dealer, it clearly would be wrong to deny standing on the theory that a valid termination could cause the same injury to the dealer. The theory makes no more sense in this case.

The court below acknowledged, but failed to weigh, most of the significant factors for a determination of standing that this Court identified in *Associated General Contractors*: that KCS was wrongly motivated to eliminate totally all competition from a coal slurry pipeline, that elimination of an entire segment of competition was the very type of injury the antitrust laws were designed to prevent, that the injury to South Dakota directly flowed from that elimination of competition, that the damages were in effect fixed by contract and easy to calculate, and that no complex apportionment of damages would be necessary. Contrary to the mandate of *Associated General Contractors*, the lower court focused exclusively on one factor, the causal connection between the antitrust violations and South Dakota's harm. The court then compounded the error by finding that there was no direct causal connection simply because South Dakota did not directly compete in the restrained market.

The decision of the Eighth Circuit on this issue is not an isolated misapplication of the principles laid down by this Court in *Associated General Contractors*. The Ninth Circuit has similarly insisted that an antitrust plaintiff be either "a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle* v. *Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987). The Third and Fifth Circuits have applied a similarly restrictive test. *Gregory Mktg. Corp.* v. *Wakefern Food Corp.*, 787 F.2d 92 (3d Cir. 1986), *cert. denied*, 479 U.S. 821 (1986); *Bell* v. *Dow Chem. Co.*, 847 F.2d 1179 (5th Cir. 1988).

However, other Circuits have recognized, as *Associated General Contractors* did, that direct participation by the plaintiff in the restrained market is not a necessary predicate for standing. The decision in *Amey, Inc.* v. *Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986), granted standing to plaintiffs who were the "targets" of anti-competitive activity (as South Dakota was), even though they were not direct participants in the restrained market. In *Adams* v. *Pan American World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1225 (1988), and *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983), the courts ultimately denied standing, but they applied the *Associated General Contractors* factors and did not simply rest on the fact that plaintiffs were not in the market.

It is evident that confusion and conflict still exist in the Courts of Appeals over the appropriate tests for antitrust standing. The Court should take the opportunity, in this important case, to clarify the tests once and for all.

II. THE DECISION BELOW CONFLICTS WITH A RECENT DECISION OF THIS COURT AND EXACERBATES CLEAR CONFLICTS AMONG THE CIRCUITS ON THE SHAM EXCEPTION TO THE *NOERR-PENNINGTON* DOCTRINE

The "*Noerr-Pennington* doctrine" is the shorthand label used to describe this Court's rulings that certain petitioning activity before the government is immune from scrutiny under the antitrust laws and other laws regulating commercial behavior. Both *Noerr* [12] and *Pennington* [13] involved lobbying efforts seeking governmental action that

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[12] *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[13] *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

would injure the lobbyists' competitors.[14] This Court ruled that such efforts could not subject the lobbyists to antitrust liability.

The Court also recognized that petitioning activity may be "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor," in which case application of the antitrust laws "would be justified." *Noerr*, 365 U.S. at 144. This sham exception was first applied in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). That case concerned the filing of some 40 administrative actions by motor carriers to block a competitor's efforts to obtain operating rights. This Court held that the litigation activity was a sham intended to burden the competitor and therefore was not entitled to *Noerr-Pennington* immunity, *id.* at 515, even though the carriers actually *prevailed* in 21 of the 40 administrative actions.[15] Two years later, the Court summarily affirmed a lower court finding that an electric company's use of litigation to block the establishment of competing municipal power systems also fell within the sham exception to *Noerr-Pennington*.[16]

A. The Lower Court's Absolutist Treatment Of Motive

The court below did not dispute that KCS had anticompetitive motives in pursuing its course of litigation, but nonetheless ruled that KCS's activities were wholly

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[14] In this case, tried before *Allied Tube and Conduit Corp.* v. *Indian Head, Inc.*, 108 S. Ct. 1931 (1988), the jury was instructed that the lobbying activities were absolutely protected. KCS App. 515.

[15] *See Trucking Unlimited* v. *California Motor Transp. Co.*, 1967 Trade Cas. (CCH) ¶ 72,298 at 84,744 (N.D. Cal. 1967), *rev'd*, 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

[16] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), *on remand*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd*, 417 U.S. 901 (1974).

protected because KCS genuinely sought judicial relief in the *Andrews* litigation. App. 27a. Even accepting the court's premise—contrary to the jury findings—that KCS genuinely sought relief, the Eighth Circuit's legal analysis was fundamentally flawed and directly contrary to this Court's guidance.[17]

The question presented was succinctly posed by the Fifth Circuit in *Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d 1358, 1371 (5th Cir. 1983):

> The usual litigant will base its decision to sue on a number of factors. Some of these considerations may be anticompetitive. Others may involve a genuine desire for judicial relief * * *. The "sham" standard must account for the existence of multiple motivations.

In recent years, some Circuits have concluded that litigation activity is protected under *Noerr-Pennington* unless it is *solely* motivated by an intent to injure competitors, with *no* genuine desire to obtain judicial relief. These Circuits regard the presence of a genuine desire for judicial relief, even if combined with or overshadowed by anticompetitive motives, as sufficient to invoke the *Noerr-Pennington* shield. *See, e.g., Coastal States Mktg., Inc.*, 694 F.2d at 1372 ("anticompetitive motives do not taint a suit filed, at least in part, in hope of judicial relief"); *Westmac, Inc.* v. *Smith*, 797 F.2d 313, 317 (6th Cir. 1986), *cert. denied*, 479 U.S. 1035 (1987) ("the

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[17] The Eighth Circuit's extended analysis of the *Noerr-Pennington* issue was necessary to its holding. Although the court stated (again contrary to the jury's findings) that KCS's efforts to assert standing in the *Andrews* litigation were not a proximate cause of ETSI's decision to terminate its contract with the State, the court recognized that KCS's efforts went beyond assertion of its own standing, and therefore it had to rule on the *Noerr-Pennington* issue. App. 26a-31a. The court below also engaged in footnoted dicta concerning the jury's findings on damages, but the discussion was expressly prefaced by the statement that "we do not pass on this issue." App. 26a, n.28.

sham exception does not apply merely because a party files a suit with the principle [sic] purpose of harming his competitor"); *Energy Conservation, Inc.* v. *Heliodyne, Inc.*, 698 F.2d 386, 388 (9th Cir. 1983) (sham exception applies "when the bringing of a suit is *solely* an effort to interfere directly with a competitor") (emphasis added).

The court below embraced this approach to the problem of mixed motives in applying the sham exception. It stated that the exception only applied if the litigation was "in fact *solely* intended to cause injury to competitors rather than to obtain governmental action," and that "[s]o long as [an actual desire for relief] existed, the issue of whether the petitioners also possessed anticompetitive motives is irrelevant." App. 23a, 29a (emphasis added). Although this approach had support in the other Circuits, it was definitively rejected by this Court last year, after the cited cases from the other Circuits but before the decision below.

In *Allied Tube & Conduit Corp.*, this Court considered a claim that *Noerr-Pennington* protected the efforts of a manufacturer to secure passage of product standards and codes that would injure a competitor. The Court expressly addressed the problem of mixed motives in assessing whether the manufacturer's conduct was protected, and ruled that the presence of a genuine desire to obtain governmental relief—in the case before it, to secure legislative enactment of the standards and codes—did *not* immunize the manufacturer's conduct. As the Court stated, "[w]e cannot agree with [the manufacturer's] absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." 108 S. Ct. at 1938. There was little dispute that the manufacturer genuinely sought governmental action, but this Court held that such an "ultimate aim is not dispositive." *Id.* at 1939.

The court below, in contrast, embraced this precise "absolutist" position, ruling that KCS's pattern of litiga-

tion activity was necessarily protected simply because KCS genuinely sought judicial relief in the *Andrews* case. According to the court below, the presence of anticompetitive purpose is wholly "irrelevant" so long as the defendant also actually sought to influence governmental action—in the litigation context, to obtain judicial relief. App. 29a. This Court in *Allied Tube* rejected both this extreme and the polar opposite extreme which would make an anticompetitive purpose decisive. On the one hand, the Court made clear that "we do not suggest that the *absence* of anticompetitive purpose is *necessary* for *Noerr* immunity." 108 S. Ct. at 1941 n.11 (emphasis added). On the other hand, the Court stated that "the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability." *Id.* (emphasis in original). The conduct in *Allied Tube* was not necessarily protected because it "was at least *partially* motivated by the desire to lessen competition." *Id.* at 1941 (emphasis added). This is in sharp contrast to the approach of the court below that litigation activity is absolutely protected as a matter of law unless it was "in fact *solely* intended to cause injury to competitors." App. 23a (emphasis added). The court below has erected a burden of proof virtually impossible to sustain.

There is no easy answer to the problem of mixed motives in applying *Noerr-Pennington* and the sham exception. As this Court concluded, the answer depends on "the context and nature of the activity," 108 S. Ct. at 1939—*i.e.*, the entire range of evidence surrounding the defendant's conduct. Such evidence was put before the jury in this case in the course of a ten-week trial, and that jury concluded that KCS's pattern of litigation activity was a sham. The Eighth Circuit overturned that finding on the basis of its "absolutist" view of *Noerr-Pennington*. This Court should grant the writ to ensure that its approach to this recurring problem is applied by the lower courts.

B. The Lower Court's Absolutist Treatment Of Partial Success

Application of the *Allied Tube* approach would also put to rest an existing conflict among the Circuits over whether the objective reasonableness and/or success of a party's position in litigation preclude a finding that the litigation is a sham. Prior to *Allied Tube*, several Circuits had ruled that reasonable or successful litigation cannot be a sham.[18] In contrast, the Fifth Circuit had held that "success on the merits does not necessarily preclude an antitrust plaintiff from proving that the defendants' earlier litigation activities were sham," [19] and the Seventh Circuit had ruled that litigation can constitute a sham unprotected by *Noerr-Pennington* "regardless of its outcome." [20]

In ruling that KCS's activities were protected "as a matter of law," the court below invoked Eighth Circuit precedent involving "litigation [which] was successful *and consequently deemed* to preclude a finding of sham or unlawful intent." [21] The court relied upon its conclusion

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[18] *See Columbia Pictures Indus.* v. *Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984); *Westmac, Inc.* v. *Smith*, 797 F.2d at 318; *Razorback Ready Mix Concrete Co.* v. *Weaver*, 761 F.2d 484 (8th Cir. 1985); *Federal Prescription Serv., Inc.* v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 266 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

[19] *In re Burlington Northern*, 822 F.2d 518, 528 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988). The dissent argued that a successful lawsuit cannot under any circumstances constitute a sham. 822 F.2d at 534.

[20] *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983).

[21] App. 29a-30a (emphasis added), citing *Razorback Ready Mix Concrete Co.* v. *Weaver*, 761 F.2d at 487. The Seventh Circuit has expressly noted that the Eighth Circuit view "appears to be * * * contrary" to its own on this point. *Grip-Pak*, 694 F.2d at 473, citing *Alexander* v. *National Farmers Org.*, 687 F.2d 1173, 1200 (8th

that "there was a reasonable basis for the action" in *Andrews* in immunizing all of KCS's activities from inquiry. App. 31a. The Fifth Circuit, on the other hand, considered the *same* claim on the *same* facts in *In re Burlington Northern*, another case arising out of the efforts of the various railroads, including KCS, to block the ETSI pipeline project. Since the Fifth Circuit does not accord the same weight to success on the merits or objective reasonableness in applying the sham exception as does the Eighth Circuit, it held—contrary to the court below—that the railroads' *Andrews* activity was *not* immune as a matter of law under *Noerr-Pennington*, but could be examined to see if it fell within the sham exceptaion. 822 F.2d at 528. The conflict is thus not merely of academic interest; it affects real-world litigation to the extent that identical conduct leads to different results in different Circuits.

This conflict should have been resolved by *Allied Tube*. Since an actual desire for relief alone can no longer be viewed as sufficient for immunity, actual success can likewise no longer confer talismanic protection from application of the sham exception. Such success or the objective reasonableness of the claim may or may not reflect the presence of a genuine desire for relief, but such a genuine desire no longer suffices to immunize the litigation activity. By failing to follow *Allied Tube*, the court below kept alive and exacerbated a persistent conflict among the Circuits.

The Eighth Circuit's approach was particularly objectionable in this case, however, because it immunized KCS's *entire* course of conduct on the basis of *one* "successful" piece of litigation. The court itself stated that "one-third of [KCS's] administrative actions * * * were

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Cir. 1982). *See also* Areeda & Hovenkamp, Antitrust Law ¶ 203.1 at 19 (1988 Supp.) (noting conflict between Sixth Circuit *Westmac* and Seventh Circuit *Grip-Pak* opinions).

directly related to the *Andrews* litigation," App. 25a, meaning that fully two-thirds were not. The court nonetheless devoted its analysis to the one-third, ignored the other two-thirds, further ignored the 19 *unsuccessful* claims in *Andrews*, found that the *Andrews* litigation was not a sham, and then overturned a jury verdict which was based on *all* the evidence. The Eighth Circuit's approach is thus not only flawed as a matter of logic, but also is in sharp conflict with this Court's decisions and those of other Circuits.

The clearest conflict is with *California Motor*, the first decision holding that sham litigation was not protected by *Noerr-Pennington*. In *California Motor*, the Court held that the sham exception applied to a course of repetitive suits brought "with *or* without probable cause." 404 U.S. at 512 (emphasis added). This Court ruled that *Noerr-Pennington* did not immunize the defendants' conduct *even though the defendants had prevailed in 21 of the 40 suits alleged to be sham.*[22] The Court did not rule that only the unsuccessful litigation was actionable, and certainly not that the successful litigation somehow "immunized" that which was not.

The Eighth Circuit's approach also conflicts with the holdings of other Circuits that otherwise-protected litigation which is part of an overall anticompetitive scheme is not entitled to *Noerr-Pennington* immunity. As the Ninth Circuit held in a leading case:

> When * * * the petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity. * * * The defendants' actions do not enjoy immunity, even though a part of the actions may have involved protected first amendment petitioning. The reach of the *Noerr-Pennington* doctrine is not that extensive, and the antitrust laws are not that impotent. [*Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240,

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[22] *See* n.15 *supra*.

1263, 1265 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).]

See also Kobe, Inc. v. *Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952); *Rex Chainbelt, Inc.* v. *Harco Prods., Inc.*, 512 F.2d 993 (9th Cir.), *cert. denied*, 423 U.S. 831 (1975). *But see In re Burlington Northern*, 822 F.2d at 526. The court below, in contrast, concluded that because "a part of [KCS's] actions" were protected (*i.e.*, the one-third involving *Andrews*), KCS was entitled to "overall immunity."

C. The Conflict And Confusion Surrounding The Sham Exception Is Persistent And Recurring

Not surprisingly, the Circuits are in disarray over the scope of the sham exception to the *Noerr-Pennington* doctrine. As the Seventh Circuit has noted, "[t]he *Noerr* and *Pennington* cases themselves provide little definition of what a 'sham' may be other than to indicate immunity for 'genuine efforts' and 'good faith' attempts to influence governmental bodies." *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1155 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). Indeed, there is a persistent chorus from the various Courts of Appeals themselves seeking guidance on what constitutes sham activity. *See, e.g., Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d at 1371 ("The Supreme Court has never defined with precision the standard for determining when litigation is a sham"); *Video Int'l Production, Inc.* v. *Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3189 (1989) (a "substantial amount of confusion" exists over exceptions to *Noerr-Pennington*); *Litton Systems, Inc.* v. *AT&T*, 700 F.2d 785, 813 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) ("the contours of the sham exception are far from clear; the courts have themselves had difficulty defining the doctrine"); *Westmac, Inc.* v. *Smith*, 797 F.2d at 320 ("the federal courts have struggled to give specific meaning to the *Noerr-Pennington* doctrine's sham exception. We need a definition of the sham exception

that is clear and analytically sound as well as functional") (Merritt, J., dissenting).

Commentators agree that application of the exception "has been plagued by considerable confusion." [23] As two authors noted recently, "[w]hat is and what is not a sham is the Hamlet-like question that has perplexed the lower courts in the two decades since the Supreme Court * * * enunciated the *Noerr* doctrine." [24] Another concluded that there is "fundamental disagreement over the test by which to identify sham petitioning." [25]

This confusion is particularly troubling because issues surrounding the sham exception to the *Noerr-Pennington* doctrine arise with considerable frequency,[26] and often, as here, in the context of major, large-scale litigation. The *Noerr-Pennington* doctrine and the corollary sham exception are applicable in a wide variety of contexts, including tortious interference,[27] antitrust,[28] civil rights,[29]

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[23] Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. Chi. L. Rev. 80, 104 (1977).

[24] Handler & De Sevo, *The* Noerr *Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1, 1 (1984).

[25] Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of* Noerr, 57 Antitrust L. J. 327, 332 (1988). *See also* Sullivan, *Developments in the* Noerr *Doctrine*, 56 Antitrust L. J. 361, 361 (1987) (Supreme Court cases in area "leave open some broad, general questions"); Note, *The Misapplication of the* Noerr-Pennington *Doctrine in Non-Antitrust Right to Petition Cases*, 36 Stan. L. Rev. 1243, 1253 (1984) ("judicial construction of the sham exception has been inconsistent").

[26] *See* Handler & De Sevo, *supra* at 14, 26 ("In recent years, there has been an explosion of case law involving claims brought under the *Noerr* doctrine" with a "dramatic increase in reliance upon the sham exception").

[27] *See* App. 22a-23a & n.24.

[28] *See, e.g., Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 108 S. Ct. at 1936-42.

[29] *See, e.g., Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Weiss* v. *Willow Tree Civic Ass'n*, 467 F. Supp. 803, 807 (S.D.N.Y. 1979).

libel,[30] and unfair labor claims.[31] Both the *Noerr-Pennington* doctrine itself and the sham exception to it are judicially created doctrines, so only this Court can provide the uniform interpretation which is so clearly lacking.

III. THE COURT BELOW VIOLATED THE SEVENTH AMENDMENT IN OVERTURNING THE JURY'S FACTUAL FINDINGS THAT SHAM PETITIONING CAUSED THE INJURY TO THE STATE

The Seventh Amendment restricts appellate review of a jury's determination of factual questions. This Court has repeatedly asserted that "it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."[32] Only when there is a "*complete absence* of probative facts to support the conclusion"[33] may an appellate court overturn a jury's findings.

The Eighth Circuit below contravened these basic principles and invaded the province of the jury in at least two significant respects. First, it focused exclusively on KCS's role in the *Andrews* litigation in considering KCS's liability. The jury, however, heard evidence on a broad range of petitioning activity by KCS apart from the *Andrews* litigation, including the so-called "window litigation", proceedings in connection with the EIS and hearings relating to federal, state and local permits.

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[30] *See, e.g., Webb* v. *Fury*, 282 S.E.2d 28, 36-37 (W. Va. 1981).

[31] *See, e.g., Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983).

[32] *Lavender* v. *Kurn*, 327 U.S. 645, 652-653 (1946). *Accord Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 116 (1963); *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944).

[33] *Lavender*, 327 U.S. at 653 (emphasis added).

Originally, the Court of Appeals sought to justify overturning the jury's findings as to the tort claim on the ground that "[t]he trial court's blanket instruction to the jury * * * submitted the question of improper interference without attempting to distinguish between the alleged interference occurring before and after the date of the contract." App. 25a, n.27. The jury, however, was expressly instructed that it "may only consider evidence as to the defendant's conduct that occurred after defendants had knowledge of the contract between plaintiffs and ETSI" (Jury Instruction 32), and unanimously answered "Yes" to the question whether "the defendant's actions taken after the defendant knew of the existence of the contract * * * were a proximate cause of the termination of that contract." App. 66a-67a (Special Verdict 11). In denying rehearing, the court amended its opinion to acknowledge that "the trial court instructed the jury * * * to consider only evidence in the tortious interference claim that occurred after KCS's knowledge of the contract." App. 36a. The court nonetheless persisted in restricting its analysis of sham petitioning to the *Andrews* litigation, stating *ipse dixit* that "the post-contract activity *predominantly* involved *Andrews* litigation and the opposition by the other states * * *." App. 37a (emphasis added).

Second, even if KCS's post-contract activity "predominantly" involved the *Andrews* case, the lower court erred because the properly-instructed jury had sufficient evidence before it to conclude that KCS's *other* activities contributed to the harm to South Dakota. The court below acknowledged that the legitimacy of those other activities was "subject to debate." App. 24a. With respect to "the period in which the contract was in effect," the court noted that "roughly one-third of the administrative proceedings mentioned above were directly related to the *Andrews* litigation." App. 25a. As stated earlier, this means that two-thirds were *not*, and yet the court simply dismissed that two-thirds as "de minimus." (sic) App.

37a. The question of the weight to accord such extensive proceedings was for the jury, and the court violated the Seventh Amendment in overturning the jury's verdict.

The same is true with respect to the question whether KCS's activities in connection with *Andrews* were sham. Other Circuits recognize that whether litigation activity is a "sham" under *Noerr-Pennington* is a question of fact for the jury.[34] Indeed, the first case applying the sham exception, *California Motor*, ruled that the "factfinder" might conclude that the activities at issue in that case constituted a sham. 404 U.S. at 513.

The jury here was expressly instructed at length on the *Noerr-Pennington* doctrine and the sham exception.[35] It was specifically told that KCS's litigation activities were protected and could not form the basis for antitrust or tort liability if they were "brought for the true purpose of seeking the relief sought therein." App. 71a (July Instruction 33). Pursuant to these instructions, the jury returned special verdicts finding that KCS's actions after it knew of the contract between ETSI and the State were a proximate cause of the termination of that contract. The court below, however, overturned the jury's conclusions and held that KCS's *Andrews*-related litigation activities, "as a matter of law," were not sham and were protected by *Noerr-Pennington*. App. 31a. It did so without any discussion of the proper weight to accord the jury's findings under the Seventh Amendment, without any recognition that the evidence must be viewed in the light most favorable to the State and that the State was entitled to all favorable inferences that might reasonably

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[34] *See, e.g., Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d at 1253 ("[w]hether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact"); *Affiliated Capital Corp.* v. *City of Houston*, 735 F.2d 1555, 1567 (5th Cir. 1984) ("[w]hether or not such conduct is within the sham exception is a fact issue for the jury").

[35] See App. 71a-72a.

be drawn from the evidence, and, indeed, without any recognition that the sham question was for the jury at all. The appellate court simply reviewed the massive record concerning KCS's activities and motive and reached a conclusion contrary to that of the jury. Certainly where a jury has been properly instructed, as it was in this case, and its determination necessarily takes into account detailed evidence about a party's motives and intent, a Court of Appeals should not be allowed to overturn the jury's verdict as a matter of law because some small part of the underlying pattern of litigation turned out to be successful.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2158

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellee,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Appellants.

No. 88-5375

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellants,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Appellees.

No. 88-5422

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellant,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; the KANSAS CITY SOUTHERN RAILWAY, INC., a Foreign Corporation,

Appellees.

Appeals from the United States District Court
for the District of South Dakota

Submitted: December 13, 1988

Filed: June 29, 1989

Before LAY, Chief Judge, HEANEY* and FAGG, Circuit Judges.

LAY, Chief Judge.

Kansas City Southern Industries and The Kansas City Southern Railway Company [1] appeal a judgment in favor of the State of South Dakota and the South Dakota Conservancy District,[2] of $600,000,000 which represents a trebled jury verdict of $200,000,000 based on a federal antitrust claim. KCS also appeals a verdict of $244,200,000 awarded to SD on a state law claim of tortious interference with a contractual relationship. KCS claims SD has no standing to assert a federal antitrust action and that any anti-competitive activity KCS may have committed is protected by the *Noerr-Pennington* doctrine. *See infra* note 23. KCS also asserts that the contract between SD and Energy Transportation Systems, Inc. (ETSI), cannot be the basis for recovery under either a antitrust or a tort theory because the contract was invalid. KC further

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* The HONORABLE GERALD W. HEANEY assumed senior status on December 31, 1988.

[1] These parties will be jointly referred to hereafter as "KCS."

[2] The plaintiffs who brought this action were the State of South Dakota and its Conservancy District, and will be jointly referred to hereafter as "SD", "the State", or "the State of South Dakota."

appeals other issues relating to the jury instructions, the statute of limitations, personal jurisdiction, venue, and the entry of judgment. The State of South Dakota cross-appeals the trial court's exclusion of its claim for lost tax revenues, failure to properly secure the judgment, and refusal to instruct the jury on certain theories. We reverse and dismiss the judgment on the antitrust claim for lack of standing. We further reverse and dismiss the judgment on the tortious interference claim for reasons set forth in our opinion.

I. Background

Energy Transportation Systems, Inc., was created during the early 1970's for the purpose of constructing a pipeline through which coal could be transported from mining sites in north central states to utility companies in south central states. This project occurred in response to the energy crisis arising in the oil industry. ETSI, which was a joint venture composed of a number of large corporations,[3] intended to transport coal in "slurry" form. Coal slurry is a mixture of roughly half coal and half water. Consequently, large quantities of water were required to operate the pipeline.

ETSI initially proposed the Madison Formation Aquifer (Madison) as the source of water for the pipeline. The Madison is an enormous, mostly subterranean body of water which exists under several states including South Dakota and Wyoming. The State of South Dakota opposed this proposal on the grounds that the pipeline's use of Madison water would be detrimental to its environment and would deplete the water supply of residents in the western part of the state. ETSI nonetheless sought

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[3] The ETSI Pipeline Project was a joint venture created as a partnership under the laws of Delaware by and among Arcoal Transportation, Inc., Bechtel Petroleum, Inc., Lehman Realty Corporation, Slurco Corporation, and Texas Eastern Slurry Transport Company. KCS app. at 707.

and received Madison water permits from Wyoming authorities.

The ETSI pipeline project also faced opposition from the railroad industry which opposed the construction of coal slurry pipelines generally. During the mid-1970's to the end of 1981, this opposition manifested itself in the railroads' refusal to grant ETSI permission to cross under existing railroad tracks. Crossing rights were fundamental to the construction of the pipeline since there was no way to build around the railroads. ETSI was eventually forced to litigate for the right to cross under the tracks. After determining that the railroads' right-of-way interests stemmed from easements rather than from ownership in fee, ETSI purchased crossing rights from the abutting fee owners. ETSI then filed quiet title actions against the railroads. In defending these cases, the railroads pursued full exhaustion of their appellate remedies.[4] However, their efforts were to no avail. From the middle of 1976 to the end of 1981, ETSI prevailed in all of the more than sixty quiet title actions.

Well into this period of "window litigation," [5] in the late 1970's, KCS and the other railroads determined that they would also oppose the ETSI pipeline project in the administrative forum. In order to construct the pipeline, ETSI was required to obtain a great number of permits and approvals from local, state, and federal agencies.

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[4] A prime example of this tactic occurred in Oklahoma where KCS' rights-of-way existed through easements. Oklahoma law clearly disfavored KCS' position in resisting the quiet title actions. KCS nonetheless pursued the appeals of these cases in the spirit of its professed objective: "delay every way we can [ETSI's] obtaining permits or grants for construction of their lines * * *." KCS app. at 645.

[5] This phrase was coined to describe "gaps" in land ownership "where the railroads did not own their rights-of-way in fee but held instead only an easement interest." SD brief at 4. *See also In re Burlington Northern, Inc.*, 822 F.2d 518, 521 (5th Cir. 1987).

The railroads focused their collective efforts in opposing the pipeline project in proceedings in which ETSI sought the various permits and approvals necessary for construction. Although they were participants in scores of administrative proceedings, the railroads' efforts were uniformly unsuccessful. KCS' most significant opposition related to the submission by ETSI of its Environmental Impact Statement (EIS). The railroads focused much of their resources toward criticism of this EIS with the intention of making the "environmental evaluation as difficult as possible * * * [and h]opefully, the State Agencies (with suggestions from Railroad people) could bog down the study with numerous statistical studies which we would hope to show would have an adverse effect on labor, local communities, and perhaps on other industries." SD supp. app. at 1001-02 (letter from W.A. Thie to Ed. Dudley, General Counsel, Oklahoma Railways Committee (June 13, 1979)). The State of South Dakota also opposed ETSI in the EIS proceedings, labeling the project "inadequate and almost cavalier in its attitude and treatment of impacts to South Dakota" and advising the Department of the Interior (Interior) to order the redraft and recirculation of ETSI's proposed EIS. KCS app. at 540. South Dakota Governor William Janklow joined with the Governors of the States of Wyoming, Montana, and Nebraska to petition the Secretary of the Interior to delay the decision on ETSI. KCS app. at 790. Despite this opposition, the EIS process was completed in the early 1980's.

As previously stated, before late 1981 South Dakota also participated in opposition to the pipeline proposal in the administrative forum. This opposition was inspired by SD's concern that ETSI would use Madison water for the pipeline and thereby deprive residents of western South Dakota of their prime water source. For a long time, South Dakota had also opposed the use of water from the Oahe Reservoir. The Oahe Reservoir is a large body of water located in central South Dakota along the

Missouri River. In 1975, Janklow, then SD's Attorney General, had officially concluded that South Dakota lacked authority to transfer or assign Oahe water rights. KCS app. at 774-786. Subsequently, a proposed sale of Oahe water by South Dakota was vetoed in 1977 by then-Governor Richard Kneip. KCS app. at 787-89.

South Dakota officials formally dropped their opposition on December 23, 1981, when the South Dakota Conservancy District (SDCD) executed an agreement with the ETSI Pipeline Project (SDCD/ETSI contract) in which ETSI agreed to use water from the Oahe Reservoir rather than from the Madison Formation. The SDCD/ETSI contract provided that the SDCD would issue ETSI a permit to draw 50,000 acre-feet of Oahe water per year. SDCD did obtain such a permit with the aid of the legislature and subsequently transferred this permit to ETSI in February of 1982. In exchange for this permit, ETSI agreed to make payments to SDCD in the following manner: $2,000,000 upon the issuance of the permit; $2,000,000 if SDCD's authority to issue such a permit was unchallenged or, if challenged, was affirmed by the state's courts; $3,000,000 on the anniversary of the issuance of the permit and every anniversary thereon until construction of the pipeline was commenced; $9,000,000 upon commencement of construction; and every year thereafter, for fifty years, payments based on an amount adjusted according to the Fixed-Weighted Price Index for the Gross National Product.[6] Additionally,

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[6] The payments were to be made in accordance with the following formula:

A = 0.5 B(1 + (C/D)) where

A = amount of payment, provided that no payment shall ever be less than the immediately preceding payment.

B = Nine Million Dollars ($9,000,000) for the second payment under this Paragraph A.4., and thereafter the immediately preceding payment under this Paragraph A.4.

C = the Fixed-Weighted Price Index for the Gross National Product for the latest available calendar year at

ETSI agreed to pay SDCD $1,500,000 if the West River Aqueduct, which was the pipeline that would carry Oahe water from central South Dakota to Wyoming, was not constructed on or before July 1, 1984. As part of the agreement, residents of western South Dakota would be allowed to tap water for their own consumption from the West River Aqueduct. ETSI retained the right to cancel this contract on thirty days notice where there was pending litigation or *if it intended to abandon the pipeline project*, and on sixty days notice if it intended to secure an alternative water source. If ETSI did not invoke its cancellation rights, this contract had a potential term of fifty years following completion of the pipeline.

On July 2, 1982, the ETSI Pipeline Project and the Department of the Interior, through the Bureau of Reclamation (BOR), executed a contract which authorized ETSI to withdraw at least 20,000 acre-feet of water annually from the Oahe Reservoir (BOR/ETSI contract). The States of Iowa, Missouri, and Nebraska, as well as KCS and several additional interested parties, filed an action to enjoin the contract and sought a declaration that Interior officials violated several federal statutes by their execution of the ETSI contract. The United States District Court for the District of Nebraska permanently enjoined the BOR/ETSI contract on the ground that Interior was not empowered to furnish Oahe water for industrial use. *Missouri v. Andrews*, 586 F. Supp. 1268, 1281 (D. Neb. 1984). In reaching its conclusion, the court interpreted the Flood Control Act of 1944, 33 U.S.C. §§ 701-709b (1982 & Supp. 1986), to mean that the Army

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the time of payment for which the Index has been published in the "Survey of Current Business" (or successor publication).

D = the Fixed-Weighted Price Index for the Gross National Product for the calendar year immediately preceding the calendar year applicable to "C", above.

KCS app. at 663.

Corps of Engineers (Corps) was to build, operate, and control main stem reservoirs while the Department of the Interior, through the Bureau of Reclamation, was to build, operate, and control the irrigation works attached to those reservoirs. *Andrews*, 586 F. Supp. at 1277. With respect to the Oahe Reservoir, the district court found no evidence that demonstrated specific storage space assigned to irrigation, much less any authority granted to Interior to use or assign Oahe water for a nonirrigation purpose such as industrial projects. *Id.* This court affirmed the district court's decision. *Missouri v. Andrews*, 787 F.2d 270, 287 (8th Cir. 1986). Ultimately, *Andrews* was affirmed by the United States Supreme Court. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). The Court expressly noted, however, that it did not pass on "the relative interests of the United States and South Dakota in Lake Oahe water." *Id.* at 808 n.2.

Soon after the district court permanently enjoined the BOR/ETSI contract in May of 1984, South Dakota refused a request by ETSI to postpone contract payments. On July 31, 1984, ETSI, describing the opposition by the railroads as insurmountable, announced its decision to terminate the pipeline project and exercised its unilateral power to cancel its at-will contract with SDCD. Later that year, ETSI attempted to renegotiate an agreement but again South Dakota refused. On May 28, 1985, South Dakota filed an amended complaint [7] against KCS in fed-

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[7] The original complaint had been filed on March 16, 1983. On January 9, 1984, KCS moved to dismiss the original complaint for lack of standing. This motion was granted in part and denied in part on July 26, 1984. *See infra* note 18. Those plaintiffs who served in a capacity as *parens patriae* were dismissed. The district court, the Honorable Andrew W. Bogue presiding, held that:

> The State is not in the coal transportation business, and the Court sees no argument relating to harm to the State which would result from lack of competition in coal transportation. That claim belongs to ETSI. ETSI is not a party to this action. *Therefore, the State's claim to anti-trust damages hinges on*

eral district court asserting federal antitrust violations of sections 1 [8] and 2 [9] of the Sherman Act and a pendant (sic) state claim of tortious interference with a contractual relationship. Motions to dismiss for lack of personal jurisdiction, improper venue,[10] and lack of standing filed by

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its demand for damages resulting from Defendants' alleged unlawful interference with the contract for sale of water.

Janklow v. Kansas City Southern Indus., Inc., No. 83-5046, slip op. at 15 (D.S.D. July 26, 1984) (emphasis added).

[8] 15 U.S.C. § 1 (1982).

[9] 15 U.S.C. § 2 (1982). South Dakota also asserted state antitrust violations of S.D. Codified Laws Ann. §§ 37-1-3.1 *et seq.* This claim, however, was not submitted to the jury.

[10] In originally deciding these issues, the district court interpreted 15 U.S.C. § 22 (1982) to permit both personal jurisdiction and venue in this case. *Janklow v. Kansas City Southern Indus., Inc.*, No. 83-5046, slip op. at 5 (D.S.D. Sept. 1, 1983) (Bogue, J.). Section 22 states:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The district court stated that "[s]ince Congress provided for nationwide service of process over both Defendants, it intended that the Court would have the authority to enforce a judgment over those same defendants. Accordingly, the Court holds that it does have personal jurisdiction over both Defendants." *Janklow*, No. 83-5046, slip op. at 8. However, the application of section 22's "provision for extra-territorial service must *in every case* satisfy constitutional due process principles. Satisfaction of the requisite due process standards are [sic] tested by the familiar 'minimum contacts' analysis of *International Shoe* and its progeny." *Reynolds Metals Co. v. Columbia Gas Sys., Inc.*, 694 F. Supp. 1248, 1250 (E.D. Va. 1988) (original emphasis). The district court provided a detailed consideration of KCS' contacts with South Dakota in its determination of the venue issue. These contacts included the fact that KCS had injected itself, either directly or indirectly, into a number of state administrative proceedings, that at least three KCS employees are regularly dispatched to make

KCS were all denied by the district court. On April 8, 1988, following a ten week trial, the jury awarded the State of South Dakota $200,000,000 on the federal antitrust claim, which the court trebled, and $244,200,000 on the state law tortious interference with a contractual relationship claim.

II. Antitrust Standing

The district court [11] found that the State of South Dakota had standing to sue KCS.

> [T]he harm to [South Dakota] was clearly foreseeable, and indeed is a necessary step in effecting the ends of the alleged conspiracy. Under the holding of [*Blue Shield of Virginia v.*] *McCready* [,457 U.S. 465 (1982),] such an integral aspect of the alleged conspiracy is unquestionably the sort of direct injury which the antitrust laws were intended to redress.

Janklow v. Kansas City Southern Indus., Inc., No. 83-5046, slip op. at 7 (D.S.D. Mar. 6, 1986). We respectfully disagree with the district court's conclusion that the State of South Dakota has standing to raise federal antitrust claims in this case.

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), a subscriber brought an action under section 1 of the Sherman Act attacking the practice of a group health plan which denied reimbursement for psychother-

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sales calls in South Dakota, that as the result of its operation as a common carrier KCS received approximately $309,000 in revenue from shipments originating from or terminating in South Dakota in 1982, and that KCS has provided 28 of its locomotives to Burlington Northern for its regular use in South Dakota. *Janklow*, No. 83-5046, slip op. at 11-12. We believe that these contacts are sufficient to support the district court's finding of personal jurisdiction and venue in this case.

[11] The Honorable John B. Jones, United States District Judge for the District of South Dakota.

apy performed by psychologists but permitted reimbursement for comparable treatment when rendered by psychiatrists. The Court held that the proper analysis required examination of (1) "the physical and economic nexus between the alleged violation and the harm to the plaintiff" and, *more particularly*, (2) "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4." *Id.* at 478. In applying the first criterion, the Court found that McCready's injury was neither "fortuitous" nor "incidental." *Id.* The harm was "clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy." *Id.* at 479. The Court further found that, *as a consumer* of psychotherapy services entitled to reimbursement under the group health plan, "McCready was within that area of the economy . . . endangered by [that] breakdown of competitive conditions' * * *." *Id.* at 480-81 (quoting *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 129 (9th Cir. 1973)). Turning to the second and more significant criterion, the Court found that as a result of an anticompetitive scheme, McCready, although not a competitor, suffered injuries that were "inextricably intertwined with the injury the conspirators sought to inflict" on the market. *Id.* at 484.[12]

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[12] Blue Shield argued that McCready could not have standing by virtue of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), because her injury " 'did not reflect the anticompetitive effect' " of the alleged violation. *McCready*, 457 U.S. at 482. The Court did not accept this interpretation:

> *Brunswick* is not so limiting. Indeed, as we made clear in a footnote to the relied-upon passage, a § 4 plaintiff need not "prove an actual lessening of competition in order to recover. [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened."

Id. (quoting *Brunswick*, 429 U.S. at 489 n.14).

One year after *McCready* was decided, in *Associated General Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Supreme Court again addressed the topic of standing when a number of labor unions alleged that a multiemployer association coerced its members and certain third parties to do business with nonunion firms. While noting the difficulty in clearly stating standards for determining standing and comparing the level of difficulty of such a task to the articulation of a standard that adequately contains the concept of proximate cause,[13] the Court discussed several factors relevant to determining whether a party has standing to raise federal antitrust claims: (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) the existence of an improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness of the connection between the injury and the alleged restraint in the relevant market; (5) the speculative nature of the damages; and (6) the risk of duplicative recoveries or complex apportionment of damages. *Id.* at 537-545.

With regard to the first *Associated General* factor, it can be argued that South Dakota's injuries were in some

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[13] The Court observed that:

> There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result of every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

Associated General, 459 U.S. at 535-37 (footnotes omitted).

way causally connected to KCS' allegedly anticompetitive conduct. However, as the Supreme Court has observed, the determination of whether there is antitrust standing is similar to the determination of whether there is proximate cause. *Associated General*, 459 U.S. at 535-37; *McCready*, 457 U.S. at 477. "[A] mere causal connection between an antitrust violation and harm to a plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect." *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)). Furthermore, for the purposes of our analysis, we grant the assumption that KCS' activities were improperly motivated.[14] *Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1241 (3d Cir. 1987); *McDonald*, 722 F.2d at 1374. This enables us to address the factor which both *McCready* and *Associated General* seem to consider paramount: whether SD's injuries were of a type that Congress sought to redress with the antitrust laws.

Without a doubt ETSI, as a competitor in the coal transportation market, and the participating utilities in the south central states, as consumers of that coal, have standing to raise antitrust claims against KCS. *See Pinney Dock & Transp. Co. v. Penn Central Corp.*, 838 F.2d 1445, 1464 (6th Cir. 1988) (*Associated General* factors include existence of more direct victims); *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24, 29-30 (D.C. Cir. 1987) (existence of superior plaintiffs who have reached settlements sufficiently vindicate public interest). These parties were obviously participants in the coal transportation market and have been the most directly

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[14] We, however, express the caveat that "an allegation of improper motive * * * is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated General*, 459 U.S. at 537 (footnotes omitted).

affected by KCS' actions.[15] South Dakota claims that, although it was not a consumer or a competitor,[16] it too was a participant in the relevant market. Essentially, SD maintains that it was constructively a member of the ETSI joint venture because it played a vital role in procuring a source of water for the pipeline. KCS, of course, claims that SD was at best a supplier existing completely outside the coal transportation market. Resolution of this

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[15] These parties have in fact brought suit. Thus KCS' alleged anticompetitive activity has been attacked by market participants. ETSI and a number of the utilities have brought suit against the railroads in the United States District Court for the Eastern District of Texas. *ETSI Pipeline Project v. Burlington Northern, Inc.*, No. B-84-979CA. KCS has since reached a settlement with the plaintiffs and has been released as a defendant in that case.

[16] The antitrust laws "were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (original emphasis)). This does not mean that the statute confines its protection solely to consumers, competitors, buyers, and sellers. *McCready*, 457 U.S. at 472 (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). *See also Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 (6th Cir. 1983) (finding that plaintiff is not direct participant in relevant market not dispositive of section 4 standing issue). *But see General Indus. Corp. v. The Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987) (citing *Associated General*, 459 U.S. at 539). Standing determinations must be made on a case by case basis. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 219 (4th Cir. 1987); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986); *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 293 (2d Cir. 1983). Nevertheless, the fact that a party is not a participant in the relevant market must be weighed heavily against a grant of standing. *Lucas v. Bechtel Corp.*, 800 F.2d 839, 844 (9th Cir. 1986). *See also Feeney v. Chamberlain Mfg. Corp.*, 831 F.2d 93, 96 (5th Cir. 1987); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987).

dispute requires a close examination of the State of South Dakota's involvement in the ETSI pipeline project.

During the early stages of the project, the State of South Dakota had vigorously opposed the pipeline project because the proposed use of Madison water threatened to deprive residents of western South Dakota of their water source. Furthermore, until 1981, SD even opposed use of Oahe water in the coal slurry pipeline. In late 1981, however, the State of South Dakota and ETSI entered into negotiations in which the State proposed to assign its rights in Oahe water in exchange for an annual fee and the distribution of a portion of that water from the West River Aqueduct. ETSI officials faced the following choice: confront South Dakota's continuing opposition by using Madison water for which Wyoming had already granted permits or enjoy South Dakota's cooperation and assistance by using Oahe water.

Eventually, ETSI decided to use Oahe water. In order to facilitate this decision, the South Dakota legislature enacted a statute authorizing the South Dakota Conservancy District to market water for energy industry use. 1981 S.D. Laws HB 1002 (amendments to S.D. Codified Laws §§ 46-1 *et seq.*). On December 23, 1981, the SDCD entered into an agreement with ETSI to assign a water right to energy industry use. In the SDCD/ETSI contract, SDCD accepted responsibility "for securing the issuance of the Oahe Permit from the [South Dakota] Water Management Board." KCS app. at 657. The SDCD/ETSI contract placed responsibility for obtaining federal permission to use Oahe water on ETSI. SDCD, however, agreed to "assist and cooperate with ETSI in securing such permission." *Id.* at 669.

As the district court had earlier ruled, South Dakota was not an actual participant in the coal transportation market. *See supra* n.7. We find that, for purposes of the

alleged antitrust injury, the State did nothing more than make an assignment of its rights in Oahe water.[17] Traditionally, suppliers of competitors in the relevant market have been denied standing because any alleged injury is considered derivative of the harm sustained by the competitor. L. Sullivan, *Handbook of the Law of Antitrust* § 247, at 773 & n.11 (1977). Because the antitrust laws were intended to protect competition, standing has been generally limited to the actual participants in the relevant market: competitors and consumers. Suppliers are allowed standing only if they were directly involved in the market. *Compare Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 393-95 (6th Cir. 1962) (supplier of raw materials to asphalt manufacturer denied standing) *with South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir. 1966) (standing granted to milk producers who provided essentially the same commodity as homogenized milk eventually sold in market) *and Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 362-65 (9th Cir. 1955) (manufacturers of finished product as it eventually entered market through distributors deemed to have standing). *See also* 2 P. Areeda & D. Turner, *Antitrust Law* §§ 340a-340b (1978); L. Sullivan, *supra* § 247.

SD's interest in the success of the coal slurry pipeline was limited to the receipt of annual payments from ETSI in exchange for the assignment of its rights to draw water

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[17] KCS and the State of South Dakota have engaged in extensive debates over whether SD was even a "supplier," i.e., whether the State had any legal interest in the water it purported to sell or assign, or if the Corps of Engineers had exclusive authority to make such an assignment. *See infra* discussion at note 28. We decide the standing issue on the antitrust claim without reaching this issue. We simply assume for the purposes of our discussion on standing that SD did have Oahe water rights to assign to ETSI.

from the Oahe Reservoir.[18] At the time of cancellation, SD had already received over $5,000,000 under the terms of the contract. However, as significant as the continuance of the payments was, this contractual relationship does not mirror the type of interest a participant has in maintaining competition in the coal transportation market.

The State of South Dakota's interest is most directly tied to decisions made by the ETSI pipeline project authorities and, although the fate of the at-will contract that existed between ETSI and SD may have been influenced indirectly by activities in the coal transportation market, the State's interest does not constitute the interest of a competitor in the coal transportation market. Similarly, as the case law makes clear, SD's role as a supplier does not create such a symbiotic relationship with ETSI that its situation is "inextricably intertwined with the injury" to the relevant market. *McCready*, 457 U.S. at 484. The State's role in providing opposition against ETSI prior to December, 1981, does not reflect the actions of a partner in the coal slurry pipeline project. Furthermore, supplying water for the slurry pipeline does not place SD in the coal transportation market.

The State of South Dakota's cross-appeal alleges that it was a participant in the "water rights market for coal slurry pipelines." The existence or nonexistence of

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[18] When this lawsuit was originally filed, motions were heard by the Honorable Andrew W. Bogue, then Chief Judge, United States District Court for the District of South Dakota. Judge Bogue found that state officials had no standing to bring a *parens patriae* suit on behalf of the citizens of South Dakota who had been deprived of a potential source of potable water from the proposed West River Aqueduct. Such an injury was deemed too remote from the alleged anticompetitive activities. *Janklow v. Kansas City Southern Indus., Inc.*, No. 83-5046, slip op. at 14 (D.S.D. July 26, 1984). Thus, the sole injury alleged by SD was the loss of revenue that it would have received but for the cancellation of the SDCD/ETSI contract. *Id.* at 15.

a water rights market for coal slurry pipelines does not change the fact that the State was not a participant in the coal transportation market. However, even assuming that SD has proven the existence of a water rights for coal slurry pipelines market, KCS was not a participant in that market. Furthermore, the fact that ETSI needed and contracted for water as a raw material to transport coal does not by any means place the pipeline project in competition with those parties who sold water rights.[19] SD's competitors in the water rights market are limited to those entities that were ready, willing, and able to sell the quantity of water needed to operate a coal slurry pipeline.

Although the State of South Dakota was allegedly injured by KCS' anticompetitive behavior, its injuries did not result from the anticompetitive nature of these practices. *Brunswick*, 429 U.S. at 489; *Gregory Mkg. Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 95-96 (3d Cir. 1986). The State's injuries were "purely an incidental result of anti-competitive activity in another segment of

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[19] At trial Dr. John Beyer testified that SD was a participant in the coal transportation market in the same way in which the Atomic Energy Commission (AEC) had been a participant in the uranium market due to AEC's position as the sole source for uranium enrichment. In essence, this argument states that a supplier can be so unique and vital to production that its interests are the same as the interests of those competitors who are actually in the market. We do not believe that this model applies to this case. The enrichment of uranium necessarily involves a manufacturing process. *Huffman v. Western Nuclear, Inc.*, 108 S. Ct. 2087, 2088 n.2 (1988). As our previous discussion illustrates, suppliers who are essentially manufacturers of a finished product are certainly more than mere suppliers. Coal slurry, on the other hand, simply describes a transportation process which in no way alters the natural composition of the material that is being transported. The supplier of the water may in no way be deemed to be the manufacturer of the coal in the way that the AEC was the manufacturer of enriched uranium. The supplier of the water is instead just one supplier of the many components involved in the proposed pipeline transportation of the coal.

the economy * * * ." *Comet Mechanical Contractors, Inc. v. E.A. Cowen Constr., Inc.*, 609 F.2d 404, 407 (10th Cir. 1980). The loss of future revenues clearly flowed from the cancellation of the contract rather than from injury to competition in the market in which it was involved. *Gregory*, 787 F.2d at 96. *See also Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 219-220 (4th Cir. 1987); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 272 (5th Cir. 1979). It is evident that South Dakota would have suffered an identical loss in the event that the railroads had done nothing and ETSI had simply decided to terminate the SDCD/ETSI contract for some other reason.[20] *McDonald*, 722 F.2d at 1376-77. Its injuries are connected to the cancellation of the contract which is necessarily an indirect effect of the alleged anticompetitive behavior. Consequently, we find that there was no proximate causation between the alleged market restraint and the harm sustained by SD. *McDonald*, 722 F.2d at 1374 (footnote omitted). *See also Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 660 (9th Cir. 1988). We hold that the State of South Dakota did not suffer an injury which could be characterized as a type that Congress sought to redress by enacting sections 1 and 2 of the Sherman Act.[21] Consequently, we hold

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[20] Although ETSI's professed reasons for terminating the SDCD/ETSI contract related to the resources necessary to deal with the railroads' opposition, the record contains a number of different factors which hastened the end of the coal slurry pipeline project. These factors include the decline in the price of oil, the deregulation of the railroad industry, and the remaining federal, state, and local agency authorization that ETSI had yet to obtain. A significant hurdle which yet remained involved securing authorization for use of Oahe water from the Army Corps of Engineers.

[21] This finding alone is sufficient to bar standing because where there is no antitrust injury there can be no entitlement to damages. *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444, 450 (8th Cir. 1985). Moreover, this finding of course obviates

that the State of South Dakota has no standing to sue KCS for alleged antitrust violations.

III. State Law Claim for Intentional Interference with Contractual Relationship

In addition to its verdict for the State of South Dakota on the antitrust claim, the jury awarded $244,200,000 on SD's state law claim of intentional interference with a contractual relationship. This amount is composed of the sum of $200,000,000 in actual damages; $10,900,000 in loss of sales, use, and contractor's excise tax that would have been generated from construction of the West River Aqueduct; $8,300,000 in prejudgment interest; and $25,000,000 in punitive damages.

The relationship with which KCS allegedly interfered was based on the SDCD/ETSI contract. The State argues that but for KCS's petitioning activities against ETSI, the pipeline project would have proceeded and South Dakota would have reaped the full worth of its contract with ETSI. KCS, relying on the provisions of the Flood Control Act,[22] contends that there was not a valid contractual relationship which could have been interfered

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the need to consider KCS' contention that SD's antitrust claim should have been dismissed because the statute of limitations had run.

[22] Section 708 of the Flood Control Act states:

> Sale of surplus waters for domestic and industrial uses; disposition of moneys
>
> The Secretary of the Army is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

33 U.S.C. § 708 (1982).

with because South Dakota did not have any water rights in the Oahe water to assign. Although the use of the surplus water within the Oahe Dam was the essential ingredient and sole purpose of the contract, KCS overlooks the fact that the contract provided other benefits to ETSI (for which it has paid substantial consideration). Additionally, South Dakota promised its cooperation and assistance to ETSI in securing a water source. The use of Madison water involved a number of potential difficulties, not the least of which would have included South Dakota's opposition. Furthermore, ownership and control as between state and federal authorities over Oahe water was far from settled. Under the contract, the State not only ended its opposition to the pipeline but in fact agreed to use whatever power it had to assist ETSI's efforts to secure permission to use Oahe water from the federal authorities.

This court has observed that "South Dakota seems to have adopted the Restatement (Second) as its statement of the tort of interference with contractual relations." *Cutter v. Lincoln Nat'l Life Ins. Co.*, 794 F.2d 352, 356 (8th Cir. 1986) (citing *Johnson v. Schmitt*, 309 N.W.2d 838 (S.D. 1981)). *See also Groseth Int'l, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159, 172 (S.D. 1987). The Restatement (Second) of Torts § 766B provides:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

The factors to be considered in determining whether the interference was improper include:

(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

Restatement (Second) of Torts § 767 (1979). For purposes of applying the Restatement (Second) of Torts, it is essential to acknowledge the fact that the contractual relationship in the instant case was terminable at will. "One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference with prospective contractual relations." Restatement (Second) of Torts § 766 comment g (1979).

In the spirit contained in Restatement (Second) of Torts § 767(e), there are certain privileged activities which may result in interference of contractual relationships but which shall not incur liability. One such activity involves the first amendment right to petition the government for redress of grievances. The *Noerr-*

Pennington doctrine[23] has been applied in evaluating whether this particular activity is entitled to protection from liability.[24] *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1317-19 (8th Cir. 1980).[25] *See also Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980); *Surgidev Corp. v. Eye Technology, Inc.*, 625 F. Supp. 800, 802-05 (D. Minn. 1986); *First Nat'l Bank of Omaha v. The Marquette Nat'l Bank of Minneapolis*, 482 F. Supp. 514, 524-25 (D. Minn. 1979). This exemption shall not apply, however, if the petitioning activities in question were "sham" and in fact solely intended to cause injury to competitors rather than to obtain governmental action. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1937 n.4 (1988). The "sham exception" shall apply where defendant's resort to the courts and agencies " 'is so clearly baseless as to amount to an abuse of process * * * .' " *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985) (quoting *Chest Hill Co. v. Guttman*,

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[23] The *Noerr-Pennington* doctrine, which arose out of the United States Supreme Court's decision in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), exempts from the antitrust laws certain petitioning of courts and administrative agencies that results in anticompetitive effects. *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972).

[24] This same doctrine has been applied to other areas of litigation. *See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (unfair labor practices); *Hufsmith v. Weaver*, 817 F.2d 455 (8th Cir. 1987) (antitrust).

[25] Although *National Organization for Women* dealt with a political boycott, one of plaintiff's complaints alleged intentional infliction of harm without legal excuse. 620 F.2d at 1316. Moreover, the court cited the analysis in *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972) for support of its position. *Id.* at 1317. *Sierra Club* was a nonantitrust case which applied *Noerr-Pennington* to "interference with advantageous relationship" claims. *Sierra Club*, 349 F. Supp. at 938.

1981-2 Trade Cas. (CCH) ¶ 64,417 (S.D. Ohio May 29, 1981)).

KCS' initial opposition to the ETSI coal slurry pipeline project involved its participation in defending the title actions beginning in the mid-1970's. The railroads failed to prevail in any of these actions. In the late 1970's, this "window litigation" began to wind down and was replaced by activity in the administrative forum. From that time until the early 1980's, KCS was involved in over thirty federal and state agency proceedings relating to the coal slurry pipeline. KCS' most significant effort in this regard involved its opposition to ETSI's proposed Environmental Impact Statement. As discussed earlier, KCS had been joined in this effort by the State of South Dakota until the SDCD/ETSI contract was executed in December, 1981.

To support its allegation of sham petitioning by KCS, SD points to the window litigation and administrative proceedings described above. Certainly the legitimacy of these activities is subject to debate. *See In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied sub nom. Union Pac. R.R. Co. v. Energy Transp. Sys, Inc.*, 108 S. Ct. 701 (1988).[26] However, we find that a determination of whether these pre-December, 1981, activities constitute sham petitioning is irrelevant to the issue of whether the State of South Dakota may raise a claim of improper interference with contractual performance. The SDCD/ETSI contract was not executed until De-

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[26] In *Burlington Northern*, the Fifth Circuit reviewed ETSI's claims that the railroads had committed sham petitioning and therefore were not entitled to first amendment protection. The court held: "We believe that ETSI's claims, if found by the district court to be supported by prima facie evidence, are sufficient to deprive the railroads' defense of the window litigation of *Noerr-Pennington* protection." 822 F.2d at 532.

cember 23, 1981. Consequently, regardless of whether KCS' conduct prior to that date can be characterized as sham, we are confined to consider only those activities that took place between December 23, 1981, and July 31, 1984: the period between the date of execution and date of termination of the SDCD/ETSI contract.[27]

During the period in which the contract was in effect, KCS continued to participate in a number of the administrative proceedings which had been commenced earlier in the decade. Again, its most prominent involvement related to the final stages of the EIS proceedings. These activities, however, were gradually being displaced by KCS' participation in the *Andrews* litigation which challenged ETSI's contract with the Bureau of Reclamation. The action for a permanent injunction barring performance of the BOR/ETSI contract was filed on August 18, 1982. The events in this case moved quickly and, on May 3, 1984, the United States District Court for the District of Nebraska enjoined performance of the contract. *Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984), *aff'd*, 787 F.2d 270 (8th Cir. 1986), *aff'd sub nom. ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). The record leaves little dispute that the district court's decision in *Andrews* was the single most important event immediately preceding the termination of the ETSI coal slurry pipeline project. Similarly, the record makes clear that, in examining KCS' overall activities between late-1981 and mid-1984, the *Andrews* litigation was by far the dominant component of those activities. Indeed, roughly one-third of the administrative actions mentioned above were directly related to the *Andrews* litigation.

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[27] The trial court's blanket instruction to the jury, although not excepted to in this regard, submitted the question of improper interference without attempting to distinguish between the alleged interference occurring before and after the date of the contract.

We need not reach KCS' claim that the State's contract was null and void because only the Corps of Engineers could contract for the use of the water.[28] We hold as a

[28] Although we do not pass on this issue, it is clear that a condition precedent to future performance of the SDCD/ETSI contract required that ETSI obtain a contract with the Army Corps of Engineers to use the water in the Oahe dam. The statute, 33 U.S.C. § 708, and the decisions in the *Andrews* litigation, make this condition clear. It is our impression that obtaining the contract from the Corps was a condition in fact for any future payment by ETSI to SD. The record, however, is silent as to whether the Corps' approval was obtainable.

In the absence of such proof we think it clear that plaintiff's alleged damages are entirely speculative and not supported by substantial evidence. Dr. Ralph J. Brown, the economic expert retained by South Dakota to testify regarding damages, altogether ignored the possibility that ETSI could have invoked the cancellation rights (as it eventually did) in any of a number of situations. Dr. Brown instead treated the SDCD/ETSI contract as if it were a promissory note. He assumed that construction of the pipeline would commence on April 1, 1986, and be completed by June 1, 1988. From the date of the actual cancellation of the contract to Brown's projected date for the pipeline completion, he testified that SDCD would receive payments totaling $24,100,000. Brown further testified that SDCD would subsequently receive $9,000,000 annually for the next fifty years. Brown added these annual payments to the future sales tax payments that would have accompanied maintenance of the West River Aqueduct, adjusted the entire sum for three percent inflation, and reached a present value amount of $210,900,000.

The most important consideration relating to the determination of damages in this case is the fact that the SDCD/ETSI contract was terminable at ETSI's will if certain events should occur. Restatement (Second) of Torts § 766 comment g ("The fact that the contract is terminable at will * * * is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach."). First, should the pipeline project be abandoned, ETSI could terminate the contract on thirty days notice. Even if ETSI were able to attain the Corps' permission to use Oahe water, the project still faced a number of obstacles in each of the seven states through which the pipeline was to pass. Perhaps ETSI had secured the necessary rights-of-way to avoid further window litigation with the railroads. Nonetheless in each of these states ETSI would have to respond to concerns that include the pipeline's impact on the environment, compliance with safety regulations,

matter of law that KCS' activities following December, 1981, in opposing the pipeline (1) had no significant or proximate causal relation to the cancellation by ETSI of the SDCD/ETSI contract and, even if they did contribute to the cancellation of the contract, (2) KCS' activities in the *Andrews* litigation were protected by the *Noerr-Pennington* doctrine.

First, we find that the successful *Andrews* litigation which enjoined the BOR/ETSI contract for use of the Oahe water never involved the formal adjudication of whether KCS had standing to participate as a party in the litigation. Although the district court originally held KCS did not have standing, it thereafter vacated its

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effect on the local work force, and proper zoning of the land through which the pipeline would pass. Success in these matters would require cooperation on the part of each state just as obtaining a water source required a great deal of cooperation from South Dakota authorities. In addition, succeeding occurrences in the economy such as the decline of inflation and a severe decrease in oil prices certainly made the coal slury pipeline project a much less lucrative investment. Moreover, the economic experts at trial testified that the deregulation of the transportation industry virtually assured a market situation in which the railroads could transport coal at lower rates than a coal slurry pipeline.

Furthermore, we find it entirely speculative that construction of the pipeline would commence by the middle or even late 1980's. In fact, KCS presented unrefuted testimony by its economic experts that the drastic economic changes and the deregulation of the railroad industry which occurred in the early 1980's made a coal slurry pipeline project infeasible.

The record also reflects that, following the district court's decision to enjoin the BOR/ETSI contract, ETSI found it necessary to exercise its right to cancel the SDCD/ETSI contract because SD refused to postpone the payment of fees under the contract. We find that under the circumstances reflected by the record, the only factor that could have prolonged the existence of the contract would have been a decision on SD's part to postpone the payment by ETSI of fees owed under the SDCD/ETSI contract. We therefore find that the jury's award of damages is in no way supported by substantial evidence in the record.

order and held that in the interests of judicial economy the court would "reserve a decision on standing until one needs to be made." SD brief at 29 n.21. This court, in affirming the permanent injunction of the contract, held that the issue of KCS' standing was "superfluous." *Missouri v. Andrews*, 787 F.2d at 274. Thus the *Andrews* litigation which brought the pipeline project to a sudden halt was successful through the efforts of the various plaintiff states: Missouri, Iowa, and Nebraska. The efforts to obtain standing by KCS were *de minimis* as a matter of law and at best only remotely related to ETSI's withdrawing from the contract. This determination renders KCS' motive in pursuing its right to join in the suit irrelevant. Furthermore, any impropriety in KCS' efforts to obtain standing was mooted by the successful litigation of the named party plaintiffs. In so holding, we do not overlook situations in which a party might unreasonably assert standing, and in which such conduct could be deemed harassment as a matter of fact and would therefore be unprotected by the *Noerr-Pennington* doctrine. *See* Comment, *Meritorious Litigation as a Section 2 Violation—In re Burlington Northern, Inc. Broadens Noerr-Pennington's Sham Exception*, 74 Iowa L. Rev. 271, 278 (1988).[29] However, KCS' efforts were formally aborted and they were not one of the successful parties. Their efforts to become formal parties in the litigation to enjoin the SDCD/ETSI contract, successful or unsuccessful as they may have been, could hardly be deemed a proximate cause of ETSI's decision to terminate the contract.

In *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), the Union Pacific Railroad, although not a formal party in *Andrews*, was found to have assisted the

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[29] This is not true here because the district court certified the question of KCS standing under 28 U.S.C. § 1292(b) as an issue where reasonable minds might differ. We find that KCS had a reasonable basis in law and fact in asserting standing in the *Andrews* litigation.

State of Nebraska in the litigation. 822 F.2d at 530-32. Assuming the record would support a similar factual finding with regard to KCS in the present case, we move to the second ground of our holding: KCS's participation in the *Andrews* litigation did not, as a matter of law, constitute "sham" petitioning and was fully protected by the first amendment.

South Dakota urges this court to adopt the reasoning contained in *Burlington Northern.* In *Burlington Northern,* the Fifth Circuit was asked to review the district court's denial of a discovery motion in an antitrust action brought against the railroads by ETSI and the southern utility companies. The court, which considered all of the petitioning done by the railroads from the mid-1970's until the mid-1980's, found that the totality of these activities could constitute "sham." It remanded the case for further findings relating to the petitioners' subjective intent so as to determine whether the actual desire for relief was a significant factor in the underlying petitioning. *Id.* at 534. So long as such a desire existed, the issue of whether the petitioners also possessed anticompetitive motives is irrelevant. *Id.* at 528. Thus, SD argues that even if the petitioning in question is successful there nonetheless remains a factual question as to whether the petitioner's subjective intent was solely to harass and interfere with a defendant's business relationship, or whether the petitioner possessed an actual desire and a justifiable expectation for judicial relief. Comment, *supra* at 278-79.

Although this circuit has indicated that "intent" is the critical factor in assessing sham litigation, *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978), we have not extended sham analysis to require submission of factual intent to the degree urged by South Dakota. In fact, this court has granted a summary judgment under an analogous circumstance where litigation was successful and consequently deemed to pre-

clude a finding of sham or unlawful intent. *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985).[30]

However, even if we were to apply SD's interpretation of the Fifth Circuit's analysis in *Burlington Northern*, when the pre-December, 1981, petitioning activities are

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[30] This is not to say that successful litigation shall categorically preclude a finding of sham. The Honorable Richard A. Posner, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, has aptly described a number of circumstances where a lawsuit may have a reasonable basis and yet be undeserving of first amendment protection:

> Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it could hope to get if it did win, were too small compared to what it would have to spend on the litigation—except that it wanted to use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and that this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms. In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome.

Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982) (citations omitted). *See also Westmac, Inc. v. Smith*, 797 F.2d 313, 315-18 (6th Cir. 1986); *Sunergy Communities, Inc. v. Aristek Properties, Ltd.*, 535 F. Supp. 1327, 1331 (D. Colo. 1982); Kintner & Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C. Davis L. Rev. 549, 576 & n.113 (1984). The instant case, however, can be distinguished from the circumstances described by Judge Posner in that the *Andrews* litigation went far beyond the pretrial stage. Moreover, there really is no dispute that, regardless of its motive, KCS genuinely sought judicial relief.

excluded we must hold that no evidence exists in the record in this case to suggest that KCS did not possess the intent to succeed in the *Andrews* litigation. In so holding we deem it significant that in *Burlington Northern* the parties were merely at the pretrial stage and the court was appraising sham litigation in terms of whether there was sufficient evidence based on the totality of KCS' petitioning activities to allow discovery as to KCS' intent. The court already had evidence of improper intent of KCS manifested by the pre-1982 window litigation. It was dealing with the overall allegation of an antitrust conspiracy extending through the entire record from the mid-1970's to 1984. Here the window litigation is immaterial, as was any involvement with the EIS proceedings in which SD joined with KCS in opposing ETSI project. The significant portion of these activities occurred before the execution of the SDCD/ETSI contract in December, 1981. There is no evidence to prove that KCS' involvement in the *Andrews* litigation following December, 1981, was not significantly motivated by a desire to prevail on the merits. Moreover, the plaintiffs did prevail in *Andrews*, thereby proving that there was a reasonable basis for the lawsuit. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743, 749 (1983); *Razorback Ready Mix Cement Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984); *Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984); *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211, 213-14 (6th Cir. 1977); *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285, 290-91 (10th Cir. 1974). Consequently, we hold as a matter of law that KCS's petitioning in the *Andrews* litigation was not sham and was fully protected under the first amendment because a significant factor in pursuing the action was the actual desire to obtain judicial relief and there was a reasonable basis for the action.

We therefore conclude that the judgment of the district court should be vacated on the grounds that (1) the State of South Dakota had no standing to bring the antitrust claim and (2) the evidence fails to show that KCS improperly interfered with the SDCD/ETSI contract through the petitioning activities occurring after December 23, 1981.

Judgment reversed and dismissed; the district court is instructed to enter judgment for the defendants.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2158

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellee,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Appellants.

No. 88-5375

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellants,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Appellees.

No. 88-5422

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellant,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Appellees.

Appeals from the United States District Court
for the District of South Dakota

JUDGMENT

[Filed August 17, 1989]

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court is reversed and cause is remanded to the district court for proceedings consistent with the opinion of this Court.

June 29, 1989

A true copy.

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit

Mandate issued 8/15/89

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-2158

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellee,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Appellants.

No. 88-5375

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellants,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Appellees.

No. 88-5422

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Appellant,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Appellees.

Appeals from the United States District Court
for the District of South Dakota

Filed: August 8, 1989

ORDER

Appellees' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of active judges voting to rehear the case en banc. Judge John R. Gibson did not participate in the passing upon of the suggestion for rehearing en banc.

Petition for rehearing by the panel is also denied.

The court on its own motion has amended footnote 27 of the opinion and the amended footnote shall read as follows:

> [27] Indeed the trial court instructed the jury to this effect, to-wit, to consider only evidence in the tortious interference claim that occurred after KCS' knowledge of the contract. However, the trial court's blanket instruction to the jury, although not excepted to in this regard, submitted the question of sham petitioning without attempting to distinguish between the alleged interference occurring before and after the contract.
>
> The state urges that the evidence of sham petitioning before the contract was entred into should be considered relevant to the intent of KCS in the post-contract period. Perhaps this was the reasoning behind the last paragraph in instruction 33 which did not attempt to distinguish between the pre-contract and post-contract period. We do not ignore the state's argument concerning intent in this regard.

> We rule, however, that the post-contract activity predominantly involved *Andrews* litigation and the opposition by the other states; as we discuss, *infra*, the railroad's interference or opposition was de minimus (sic) in the post-contract period and as a matter of law was not a direct cause to the cancellation of the contract.

It is so ordered.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV. 83-5046

WILLIAM J. JANKLOW, Governor STATE OF SOUTH DAKOTA; MARK V. MEIERHENRY, Attorney General of the State of South Dakota; CITY OF PHILIP, a Political Subdivision of the State of South Dakota; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Plaintiffs,

vs.

KANSAS CITY SOUTHERN INDUSTRIES INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Defendants.

ORDER

[Filed July 26, 1984]

Pursuant to the Memorandum Opinion filed concerning Plaintiffs' standing, it is hereby

ORDERED that William Janklow, Governor and Mark Meierhenry, Attorney General as *parens patriae* for the citizens of South Dakota, and the City of Philip lack standing for treble damages actions for alleged violations of §§ 1 and 2 of the Sherman Act, and Defendants' Motion to Dismiss those claims is granted. It is further

ORDERED that the State of South Dakota and SDCD have standing for treble damages actions for alleged violations of §§ 1 and 2 of the Sherman Act and Defendants' Motion to Dismiss those claims is denied. It is further

ORDERED that Defendants' Motion to Dismiss the state anti-trust claims is denied.

Dated this 26th day of July, 1984

BY THE COURT:

ANDREW W. BOGUE
Chief Judge

ATTEST:

WILLIAM F. CLAYTON
Clerk

By Alice R. Raesly
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV. 83-5046

WILLIAM J. JANKLOW, Governor STATE OF SOUTH DAKOTA; MARK V. MEIERHENRY, Attorney General of the State of South Dakota; CITY OF PHILIP, a Political Subdivision of the State of South Dakota; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Plaintiffs,

vs.

KANSAS CITY SOUTHERN INDUSTRIES INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,

Defendants.

MEMORANDUM ORDER

[Filed July 26, 1984]

Plaintiffs sued Defendants for alleged violations of federal and state anti-trust laws and for tortious interference with contract. Defendants now challenge Plaintiffs' standing to bring the federal and state anti-trust claims. The Court is called upon to reconcile two recent Supreme Court decisions and a more recent Eighth Circuit Court of Appeals decision with the facts alleged in Plaintiffs' Complaint.

PLAINTIFFS' COMPLAINT

The Complaint lists the Plaintiffs as William Janklow, Governor of South Dakota and Mark Meierhenry, Attor-

ney General of South Dakota in their capacity as *parens patriae* for the benefit of the citizens of the State of South Dakota; the State of South Dakota; City of Philip, South Dakota and South Dakota Conservancy District (SDCD), an agency of the State of South Dakota. Defendants are listed as Kansas City Southern Industries, Inc., a holding company and Kansas City Southern Railway Company, a railroad corporation. The Complaint lists, but does not name as Defendants six other railroad companies as co-conspirators. The Complaint also lists Energy Transportation Systems, Inc. (ETSI) as a participant but non-party.

The Complaint alleges that South Dakota, SDCD and ETSI executed a contract for the sale of water from the Missouri River in South Dakota to ETSI. Plaintiffs allege that South Dakota would receive One Billion Three Hundred Seventy Four Million Dollars ($1,374,000,000) from ETSI over the term of the contract. Defendants (sic) actions in regard to this contract comprise the issues in this case.[1] Plaintiffs allege that the actions of

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[1] In this Complaint, Paragraph 35, Plaintiffs' (sic) allege that Defendants specifically have combined and conspired to do, and are continuously to:

(a) Prohibit the financing, construction and development of coal slurry pipelines;

(b) Prohibit the construction, financing and development of any non-railroad method of transportation of coal from the Powder River Basin in Wyoming to points in other states;

(c) Delay, impede, and prohibit construction and development of the coal slurry pipeline project;

(d) Delay, impede, and prohibit the State of South Dakota's water from moving in trade and commerce.

(e) Prevent the distribution of water from the Oahe Reservoir to drought stricken areas of western South Dakota;

(f) Prevent distribution of potable water to other citizens of South Dakota in betterment of their health and enjoyment of life.

(g) Deny the revenues rightfully due and contractually agreed to the State of South Dakota;

the Defendants and alleged co-conspirators caused harm to the Plaintiffs by obstructing the completion of the terms of the water sale contract and thereby preventing the benefits of that contract from flowing to Plaintiffs. Plaintiffs' Complaint states that Defendants' acts violate Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) it's state counterparts (SDCL 37-1-3.1 et seq.), and

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(h) Acquire and maintain through concerted action the railroads' monopolistic position in coal transportation from the Powder River basin;

(i) Attempted to intervene in bad faith in administrative proceedings before the South Dakota Water Management Board concerning the assignment of and the water right from SDCD to ETSI pursuant to the ETSI contract for the purpose of imposing a direct restraint and delay in completion of legal requirements of the coal slurry pipeline project.

(j) Engaged in sham litigation as part of a scheme to restrain trade, consisting of the following:

i. Participating in multiple lawsuits in the State of Oklahoma and other states solely for the purpose of impeding and delaying the coal slurry pipeline project and furthering their monopolistic position;

ii. Making appearances in bad faith before numerous federal state, local, and county boards for the purpose of delaying the coal slurry pipeline project;

iii. Filed a bad faith action, which is frivolous and dilatory in the District Court of Nebraska entitled *Kansas City Southern Railway Company, et al v. Andrews, et al.*, (Civil File No. 82-L-443);

iv. Directed litigation through others in the circuit courts of South Dakota for the purpose of delay of the coal slurry pipeline project;

(k) Conspired through written communication and by numerous telephonic and personal meetings in March, April, May, July, and August of 1974 to establish and further the goals of the conspiracy and have contrived to conspire until the present time. Further, (sic) engaged in meetings in Washington, D.C. during the month of June, 1974, to further accomplish the conspiratorial goals and aims.

tortious interference with contract. Whether Plaintiffs have standing to pursue their federal anti-trust claims is the major question presented.

CASES

A. *McCready*

In *Blue Shield v. McCready*, 457 U.S. 465 (1982), the Supreme Court held that an insured had anti-trust standing to sue an insurance company which had a policy of paying for psycho-therapy services provided by psychiatrists but denying payment for like services procured from psychologists. The Court began its analysis by examining § 4 of the Clayton Act which provides a treble damages remedy to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws. 15 U.S.C. § 15." 457 U.S. at 472. The Court used expansive language in discussing this statute's scope.[2] "As we recognized, '[t]he statute does not confine its protection to consummers, (sic) or to purchasers, or to competitors, or to sellers . . . . The act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whom ever they may be perpetrated." 457 U.S. at 572.

Utilizing this expansive foundation, the *McCready* Court analyzed plaintiff's claim. The Court found direct harm in the fact that plaintiff was forced to pay for the psychologist's services out-of-pocket when defendant refused to pay. 457 U.S. at 475. The Court then disposed of the remoteness question by finding that because Plaintiff was harmed by the precise means that Defendant attempted to use to reach its illegal ends, that Plaintiffs

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[2] The discussion concerning scope appears to this Court to be a major distinction between *McCready* and *Associated General, Contractors v. Carpenters*, —— U.S. ——, 74 L. Ed.2d 723 (1983) discussed below. Therefore, the Court approaches this language with some caution. However, the Court did cite *McCready* with approval in *Associated General*. 74 L. Ed.2d at 738.

were not too remote. 457 U.S. at 479 (citing *Brunswich* (sic) *Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489).

The *McCready* Court held that as a consumer, Plaintiff was a person entitled to protection under the anti-trust laws. 457 U.S. at 480. In discussing the type of injury suffered, the Court held that to recover treble damages, Plaintiff's injuries should "be linked to the pro-competition policy of the anti-trust laws." 457 U.S. at 482. The Court concluded that *McCready* had alleged an anti-trust injury because her injury "flow[ed] from that which makes defendants' acts unlawful . . .". 457 U.S. at 484.

B. *Associated General*

Less than a year later, the Supreme Court again examined the question of standing for treble damages actions. *Associated General Contractors v. Carpenters* [Associated General], —— U.S. ——, 74 L. Ed. 2d 723 (1983). The *Associated General* Plaintiffs alleged that defendants coerced landowners and others to give business to non-union firms. 74 L. Ed. 2d at 732. The Court held that plaintiffs had stated an anti-trust claim.

> An agreement to restrain trade may be unlawful even though it does not entirely exclude it (sic) victims from the market. [citation omitted] Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.

74 L. Ed. 2d at 732.

The Court turned to whether the union was a proper party to bring the anti-trust claim. In contrast to the expansive language of *McCready*, the Court proceeded to determine what limitations should be placed on Section 4.

The Court noted that the union was neither a competitor nor a consumer in the relevant market. 74 L. Ed. at 738. The Court also noted that it was not clear whether the union's interests would be served or disserved by enhanced competition in the market. 74 L. Ed. at 739. Finally, the Court held that each case must be analyzed to determine whether it is of the type that the anti-trust laws were designed to forestall. *Id.* The Court then identified several factors relevant to determine whether a plaintiff in a given case is a proper party to bring an anti-trust action. Ultimately, the Court concluded that the union was not a proper party to bring the anti-trust claim.

> Other relevant factors—the nature of the union's injury, the tenuous and speculative character of the relationship between the alleged anti-trust violation and the union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the union's anti-trust claim.

74 L. Ed.2d at 743.

C. *McDonald*

The Eighth Circuit Court of Appeals confronted the anti-trust standing question after *McCready* and *Associated General*. *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1983). In *McDonald*, plaintiffs alleged that Johnson & Johnson inhibited the market for TENS (a non-medicinal pain reliever) devices by buying the corporate stock of plaintiffs' corporation and refusing to market the device properly. The Eighth Circuit catalogued the factors identified by the *Associated General* court to determine whether plaintiffs were proper parties to bring a treble damages action.

> Whether the plaintiffs are proper parties depends on the factors articulated in *Associated General.* These are: (1) the causal connection between the alleged anti-trust violation and the harm to the plaintiff; (2) improper motive; (3) whether the injury was of a type that Congress sought to readress (sic) with the anti-trust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; (6) the risk of duplicate recoveries or complex damage apportionment.

772 F.2d at 1374.

In discussing these factors the Eighth Circuit noted that mere causal connection was insufficient. The injury must be of the type that the anti-trust laws were designed to prevent. *Id.* The Eighth Circuit disposed of the case by holding that because plaintiff sold their entire interest in the competition, their injury could not be related to anti-competitive actions. 722 F.2d at 1376. The court summarized its conclusion as follows:

> [W]e find that (1) plaintiffs voluntarily withdrew themselves from competition; (2) there was no causal connection between plaintiffs' harm and the alleged market restraint; (3) there was only speculative damage shown; and (4) any injury plaintiffs have shown was not a type that Congress sought to redress under the anti-trust laws.

772 F.2d at 1379.

APPLICATION TO PRESENT FACTS

The above cases indicate that this Court must decide the standing question on the individual facts of this case. Substitution of labels for analysis is clearly counterproductive. The Court must decide whether each individual Plaintiff entity has proper standing pursuant to the analysis outlined above. In viewing this case, this Court

assumes that Plaintiffs can prove the facts alleged in their Complaint, but does not assume that Plaintiffs can prove facts that they failed to allege or that Defendants violated anti-trust laws in ways not alleged in the Complaint. *Associated General*, 74 L. Ed.2d at 731.

William J. Janklow and Mark V. Meierhenry are named Plaintiffs only in their capacity as *parens patriae* for the citizens of the State of South Dakota. Therefore, their standing to bring the federal anti-trust treble damages claim is dependent on the standing of the citizens of the State. Plaintiffs' Complaint states several allegations of the effects of Defendants' actions.[3] Liberally reading Plaintiffs' Complaint, only the deprivation of potable water appears to apply to the citizens of the State. Apparently, Plaintiffs agree. Plaintiffs' response to Defendants' Motion to Dismiss at page 37-39.

The interests of the City of Philip are identical to that of the Plaintiff citizens. Therefore, their standing is identical to that of the Plaintiff citizens. This Court will

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[3] Plaintiffs' Complaint at p. 14 states:

36. The aforesaid combinations and conspiracies have had, and are continuing to have, the following effects, among others:

(a) Restricting and eliminating competition among other modes of transportation of coal;

(b) Restricting and eliminating competition in the interstate shipment of water;

(c) The State of South Dakota has been deprived of much needed jobs, and property which would be subject to taxation and would produce revenue for the State of South Dakota

(d) The City of Philip and other western communities have been deprived of much needed potable water. The water development of the State of South Dakota has been impeded.

(e) The possibility that the ETSI contract with the State of South Dakota would be cancelled.

(f) The coal slurry pipeline project is presently being delayed.

consider both Plaintiff citizens and City of Philip as water consumers for purposes of discussion. The question then is whether a water consumer would have standing to bring an anti-trust action against Defendants for the deprivation of potable water because of the alleged obstruction of the pipeline from the Oahe Reservoir to the Powder River Basin.

This Court must first determine the causal connection between the alleged anti-trust violation and the harm to Plaintiffs. *McDonald*, 722 F.2d at 1374. The water consumers allege that but for Defendants' alleged illegal activities they would have cheaper potable water. Their loss would be the difference between the cost of water from the pipeline to be built by ETSI as compared with alternative sources. If Plaintiffs prove their case, they will have shown a direct harm to the persons who would consume water from the ETSI pipeline. This harm would directly flow from obstruction of the project. Therefore, this element balances in favor of the Plaintiff water consumers.

Next, the Court must consider Defendants' motive. *McDonald*, 722 F.2d at 1374. Plaintiffs allege that Defendants acquired a monopolistic position and conspired and combined through a list of illegal activity solely to prevent Plaintiffs from fulfilling the terms of the water sale contract. Plaintiffs' Complaint at p. 11-14. If Plaintiffs can prove the allegations of their Complaint, they would prove that Defendants acted unlawfully, intentionally, maliciously and in bad faith. Again, this factor tips in favor of the water consumers.

Third, the Court must consider whether the injury was of a type that Congress sought to redress with the anti-trust laws. *McDonald*, 722 F.2d at 1374. As the *Associated General* court noted, "[T]he Sherman Act was enacted to assure customers the benefits of price com-

petition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market." 74 L. Ed.2d at 738.

If Plaintiffs prove their case, they will show that Defendants are in the business of transporting coal. Further, ETSI is attempting to enter the coal transportation field by building a pipeline from the Oahe Reservoir in South Dakota to the Powder River Basin in Wyoming. ETSI would use that water to run a coal slurry pipeline to points south. Without the pipeline the western South Dakota citizens do not reap the benefits of the pipeline, namely cheaper water. South Dakota is selling to ETSI a permit which would allow it to pipe the Missouri River water. Plaintiffs allege that the South Dakota water consumers will pay a higher price because of Defendants' conspiracy targeted at the supply of water. Defendants argue that the water consumers are too remote. They argue that Defendants are in the coal transportation business and any injury suffered by a water consumer is too remote, since the competition is in the coal transportation business. Again, however, assuming Plaintiffs are correct, the unlawful conspiracy is targeted precisely at the water supply. The other side of the coin is that even assuming that Plaintiffs are correct, Defendants have no interest in increasing the cost of water in South Dakota nor depriving the citizens of water. Their only alleged interest is in stopping the supply of water necessary to complete the coal slurry pipeline. Is this the type of injury that the anti-trust laws were designed to remedy? This Court agrees with Defendants that the above discussed cases indicate that the water consumers injured because of Defendants' alleged attempt to stop the supply of water to Wyoming are too remote and their injuries are not of the type which the anti-trust laws were designed to remedy. This factor then weighs in favor of Defendants.

Next, the Court must examine the directness between the injury and the market restraint. *McDonald*, 722 F.2d at 1374. As the discussion above indicates, the Court finds that any injury to this class of Plaintiffs is indirect. No doubt that if Plaintiffs prove their case, they will have established a harm caused by the targeting of the water supply. However, the Complaint seems to indicate a conspiracy directed at ETSI and South Dakota. The harm to the water consumer is indirectly caused by targeting the water supply; not caused by a scheme designed to deprive the water consumers of Missouri River water. Therefore, this factor also weighs in favor of the Defendants.

Are the damages speculative? *McDonald*, 722 F.2d at 1374. The water consumers claim that the water they would have received from the pipeline would have been cheaper than from other sources. The Court has not way of knowing whether Plaintiffs can prove what other sources exist and to accurately project the cost of water from them. Assuming they could, the amount of damages would not be speculative. If they cannot, the damages would be speculative. The Court has insufficient information to balance this factor one way or the other.

Finally, the Court must consider the risk of duplicate recovery or complex damage apportionment. *McDonald*, 722 F.2d at 1374. In considering this factor, it seems that the Court must consider not only the Plaintiffs, but also the potential Plaintiffs. ETSI is, of course, the most significant of the potential Plaintiffs. Assuming that Plaintiffs succeed, they will prove an illegal conspiracy to interfere with ETSI. ETSI is Defendants' direct competitior in the coal transportation business. The Court must at least consider whether duplicate recoveries or complex damage apportionment could result should the Court allow all actual and potential Plaintiffs to proceed.

If ETSI sued, they would presumably seek lost profits resulting from Defendants' obstruction of their market

entry. The State of South Dakota basically seeks recovery of the revenue it would receive if the contract were performed. The citizen Plaintiffs would attempt to recover the difference between the cost of water with or without the pipeline.

ETSI would not receive revenue from the water consumers for water. *See* attachment to Complaint at p. 21. Nor would the State's attempt to recover duplicate either ETSI's or the water consumers' potential damages. Neither does it appear that it would be difficult to apportion recovery among the Plaintiffs and ETSI. Therefore, it appears that this final factor weighs in favor of the Plaintiff water consumers.

The above discussion indicates that the question of standing of the water consumers must be struck in favor of the Defendants. The Court finds that the water consumers are too remote and their injury is not the type of injury that the federal anti-trust laws were designed to remedy. Therefore, the water consumers lack standing to seek recovery for Defendants' alleged violations of the Sherman Act.

B. *Plaintiffs State of South Dakota and SDCD*

Plaintiffs' State of South Dakota and SDCD interests are also identical in this case. SDCD is an entity of the State. Both entities seek performance of the ETSI contract to insure that the contract benefits flow to the State and its citizens. The State and SDCD will be jointly referred to as the State for ease of discussion. Footnote 3 at p. 11 *Supra* contains Plaintiffs' specific allegations of the alleged effects of Defendants' actions. It appears that the State is seeking to recover for alleged interference with competition in the coal transportation business and with its attempt to provide water for the ETSI project. The State is not in the coal transportation business, and the Court sees no argument relating to harm to

the State which would result from lack of competition in coal transportation. That claim belongs to ETSI. ETSI is not a party to this action. Therefore, the State's claim to anti-trust damages hinges on its demand for damages resulting from Defendants' alleged unlawful interference with the contract for sale of water.

Proceeding with the six point *Associated General/ McDonald* inquiry, the Court must first examine the causal connection between the alleged anti-trust violation and the harm to the State. *McDonald*, 722 F.2d at 1374. Plaintiffs allege that Defendants unlawfully interfered with the State's attempt to provide water to ETSI. The Court has no question but that any activity was intended to stop ETSI. However, in doing so, Plaintiffs allege that Defendants targeted the State's sale of water to ETSI. Therefore, if Plaintiffs ultimately prevail, they will have proved a direct causal connection between Defendants' conduct and the State's injury. The first factor then tips in favor of the State.

The Court must then turn to Defendants' motive. *McDonald*, 722 F.2d at 1374. As discussed in the previous section, if Plaintiffs succeed they will prove that Defendants acted intentionally, maliciously and in bad faith. Obviously, this factor tips again in favor of the Plaintiffs.

Next, the Court must consider whether the State's injury was of the type that Congress sought to redress with the anti-trust laws. *McDonald*, 722 F.2d at 1374. Plaintiffs allege that Defendants specifically targeted the water source. Defendants (sic) actions will allegedly prevent the State from fulfilling its contract with ETSI. The Sherman Act was enacted to protect the economic freedom of participants in the relevant market. *Associated General*, 74 L. Ed.2d at 738. The State alleges that Defendants are injuring them by keeping them out of the water supply market. Therefore, Plaintiffs do allege the

type of injury which the anti-trust laws are intended to remedy and this factor also tips in the State's favor.

How direct is the relationship between the injury and the alleged market restraint? *McDonald*, 722 F.2d at 1374. Since Plaintiffs allege that Defendants' activity is targeted directly at the State's attempt to sell water to ETSI, the Court finds a very direct relationship. As the *McCready* court stated:

> Denying reimbursement to [Plaintiffs] for the cost of treatment was the very means by which it is alleged that [Defendant] sought to achieve its illegal ends. The harm to [Plaintiffs] was clearly foreseeable; indeed it was a necessary step in effecting the ends of the illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.' [citations omitted]

457 U.S. at 479.

The State is seeking to recover its lost gains from the ETSI contract. This is not speculative. Also, the Court must consider the risk of duplicate recovery or complex damage apportionment. 722 F.2d at 1374. No other prospective party can claim the State's benefit under that contract, therefore, the Court finds no danger of duplicate or complex damages.

All of the factors weigh in favor of the State. Therefore, the Court holds that the State of South Dakota and the SDCD do have standing to bring the Sherman Act claims against Defendants.

THE STATE LAW CLAIMS

Defendants also argue that Plaintiffs lack standing to bring the State anti-trust claims. Defendants argue that the disposition of the Sherman Act claim is dispositive.

Obviously, since this Court found standing for the State and the SDCD, those Plaintiffs also have standing under the State anti-trust laws.

Plaintiffs argue that SDCL 37-1-33 makes the State anti-trust remedy broader than the federal one.

> No provision of this chapter shall deny any person who is an indirect purchaser the right to sue for damages. Provided, however, that in any case in which claims are asserted against the defendant by both direct and indirect purchasers the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer in consolidation of all actions. Provided further that no person other than the attorney general of this state shall be authorized to maintain a class action in any court of this state for indirect purchasers asserting claims under §§ 37-1-23 to 37-1-32 inclusive.

Defendants argue that there is a requirement that the indirect purchasers must be purchasers or consumers of the Defendant or the statute does not apply. Defendants cite no authority for that proposition. The Court disagrees. If every Plaintiff had to be a direct consumer of Defendant, then there is absolutely no reason to provide a special statute for indirect purchasers. It appears that the legislature decided that the protection afforded by allowing only the attorney general to bring class actions would provide sufficient protection for potential defendants. The Court holds that State anti-trust standing is broader than that provided by the federal statutes. The Court further holds that based on the previous discussion the water consumers have standing through the attorney general to bring the State treble damages anti-trust claim.

As indicated by Plaintiffs, Defendants raise no argument challenging the state law claim for tortious interference with contract. Therefore, Count III will also stand.

CONCLUSION

Based upon the analysis mandated by *Associated General v. Carpenters*, —— U.S. ——, 74 L. Ed.2d 723 (1983) and *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1983), the Court finds that William Janklow, Governor and Mark V. Meierhenry, Attorney General as *parens patriae* for the citizens of South Dakota, and the City of Philip lack standing for a treble damages action for violations of §§ 1 and 2 of the Sherman Act. However, the Court holds that the State of South Dakota and the SDCD do have standing for a treble damages action for violations of §§ 1 and 2 of the Sherman Act.

In addition, the South Dakota statutes provide broader standing, and all Plaintiffs have standing for treble damages actions under the state anti-trust laws.

Dated this 26th day of July, 1984.

/s/ Andrew W. Bogue
ANDREW W. BOGUE
Chief Judge
United States District Court

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 26th day of July, 1984.

/s/ William F. Clayton
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 83-5046

WILLIAM J. JANKLOW, Governor, State of South Dakota; STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,

Plaintiffs,

-vs-

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation.

Defendants.

APPEARANCES:

For the Plaintiffs

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MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS

[Filed March 6, 1986]

Plaintiffs commenced this action on March 16, 1983, making claims under the federal and state antitrust laws and making a pendent state claim. Defendants moved to dismiss the action under Rule 12, and after consideration and entry of a memorandum opinion, Judge Bogue granted the motion in part and denied it in part on July 26, 1984. Thereafter, plaintiffs served an amended complaint reflecting Judge Bogue's decision, and defendants moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that (1) plaintiffs lack standing to assert any of the antitrust claims, and (2) the complaint as a whole fails to state any federal or state claim upon which relief can be granted. Defendants also moved to dismiss on the ground that the complaint does not comply with Fed. R. Civ. P. 8(a).

This case was assigned to me for resolution when Judge Bogue took senior status.

The arguments of the parties are basically the same as those presented to Judge Bogue. Since his decision, the Eighth Circuit Court of Appeals has decided two antitrust cases, *Henke Enterprises, Inc. v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488, decided December 2, 1984 and *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444, decided December 12, 1985.

Defendants argue generally that the plaintiffs are a "supplier" of water to ETSI, and have cited a number of cases for the proposition that a "supplier" lacks antitrust standing.

The definitive case on antitrust standing, and the case which controls the standing issue herein is *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982).

Plaintiffs herein allege that defendant has conspired with other entities to unlawfully restrain trade in the coal transportation industry by engaging in "sham" litigation and other activities designed to prevent plaintiff from supplying water to a coal slurry pipeline which would have competed with defendant's railroad in the coal transportation business. Plaintiffs also allege that defendant's activities constitute unlawful tortious interference with contract under state law. Defendant has moved to dismiss on the grounds that plaintiffs do not have standing to sue under the antitrust laws, and that plaintiffs (sic) state law claim fails to state a cause of action. It is my view that plaintiff does have standing to sue under the antitrust laws, and that their state law claim does state a claim upon which relief may be granted. This position, I believe, is supported by the following authority and analysis.

The definitive case on antitrust standing, and the case which controls the standing issue herein, is *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). The plaintiff in *McCready* was a subscriber to a group health plan which refused to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists. *Id.* at 467. Plaintiff alleged that her insurance carrier and the Neuropsychiatric Society of Virginia were engaged in an unlawful conspiracy to restrain competition in the psychotherapy market. *Id.* The district court granted the defendants' motion to dismiss on the ground that plaintiff had not suffered an injury "within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws." *Id.* at 470. Noting that the goal of the alleged boycott was to exclude clinical psychologists from a segment of the psychotherapy market, the district court held that only the competitors in the market; *i.e.*, the psychologists themselves, would have standing to sue on the grounds

alleged by plaintiff. *Id.* The Fourth Circuit Court of Appeals reversed, and the Supreme Court affirmed. *Id.* at 471, 485.

The Supreme Court began its analysis by noting that Section 4 of the Clayton Act provides a treble-damage remedy to "[*a*]*ny person* who shall be injured in his business or property *by reason of anything* forbidden in the antitrust laws." *Id.* at 472, quoting Clayton Act Section 4, 15 U.S.C. § 15 (emphasis supplied by the Supreme Court). This lack of restrictive language, the Court held, "reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *McCready*, 457 U.S. at 472. The Court went on to make the following statement of law:

> As we have recognized, '[*t*]*he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers* . . . . The Act is comprehensive in its terms and coverage, *protecting all who are made victims* of the forbidden practices by whomever they may be perpetrated.' *Mundeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). Consistent with the congressional purpose, *we have refused to engraft artificial limitations on the § 4 remedy.*

Id. (Emphasis supplied). Therefore, the Court held that the statutory phrase "any person" should be afforded its "naturally broad and inclusive meaning," and should be restricted only in the presence of "some articulable consideration of statutory policy suggesting a contrary conclusion in a particular *factual* setting." *Id.* at 473 (emphasis supplied).

These passages from *McCready* make clear that antitrust standing is not confined to competitors in the affected

market, and there is no per se rule denying antitrust standing to suppliers, or to any other person who suffers in his business or property because of anticompetitive behavior.

Rather, standing exists in every case where an injury results from an antitrust violation and there is no "articulable consideration of statutory policy suggesting a contrary conclusion in [that] particular factual setting." In *McCready*, the Court enumerated the three "articulable considerations of statutory policy" which it has, thus far, recognized as requiring a narrowing of the availability of the antitrust remedy. Those are: (1) a state does not have standing to sue in its parens patriae capacity for damages to its general economy; (2) Indirect purchasers of goods or services from an antitrust defendant do not have standing to sue for damages sustained by virtue of overcharges imposed by the defendant upon his direct purchasers; and (3) persons who have sustained injuries *too remote* from an antitrust violation shall not have standing to sue for damages under the antitrust laws. *Id.* at 473-74, 476. The first two of these exceptions are irrelevant to the case at bar; therefore our analysis herein must focus on the third exemption.

The remoteness exception to the general rule of granting antitrust standing to all parties injured by an alleged violation of the antitrust laws in essence excludes two types of cases: (1) cases wherein the causal link between the violation and injury is indirect, incidental or fortuitous; and (2) cases wherein the alleged injury is not the type of injury which the antitrust statutes were intended to prohibit ("antitrust injury"). *See, e.g., McCready, supra*, 457 U.S. 478-79, 481-84. Each of these exemptions has been explored in detail in other Supreme Court cases; the former is discussed in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 579 (1983), and the latter is discussed in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Defend-

ants herein argue that these cases require dismissal in the case at bar; however, a plain reading of these cases shows that they are inapposite and do not control the issues herein.

In the case at bar, the alleged goal of the conspiracy is to exclude coal slurry pipelines from competing in the coal transportation market. Preventing plaintiffs from supplying water to such pipelines is the means by which it is alleged that defendant seeks to achieve its illegal ends. Thus, the harm to plaintiffs was clearly foreseeable, and indeed is a necessary step in effecting the ends of the alleged conspiracy. Under the holding of *McCready* such an integral aspect of the alleged conspiracy is unquestionably the sort of direct injury which the antitrust laws were intended to redress. *Id.* In this respect the causal nexus linking plaintiffs' injuries to the alleged violation is clearly distinguishable from the "vaguely defined" or "ripple effect" chain of causation in *Associated Contractors*, where the injuries suffered by the Union were not a "necessary step in effecting the conspiracy," but were rather an "indirect result" of the harm suffered by the entities against whom the conspiracy was directed. *See Associated Contractors, supra*, at 540-41.

Analyzing the case at bar in terms of "antitrust injury" as defined in *Brunswick* and *McCready*, it is clear that the facts herein fall squarely within the realm of "anti-competitive effects." Unlike the plaintiff in *Brunswick Corp.*, plaintiff herein is not suffering injuries because of increased competition in the affected market. Rather, plaintiff's injury is analogous to the injury suffered by the plaintiff in *McCready*. Defendant herein has allegedly engaged in activities intended to prevent plaintiff from selling water to the coal slurry pipeline, for the purpose of eliminating the pipeline from the coal transportation market. The antitrust injury is borne in

the first instance by plaintiff, who is unable to supply the pipeline with the water it needs to compete in the market. The antitrust injury is borne in the second instance by the pipeline itself, which is unable to compete. The antitrust injury is borne in the third instance by the customers of the competitors in the form of increased coal prices caused by suppressed competition in the coal transportation market. Plaintiff bears the initial blow of this allegedly anticompetitive scheme, being prevented from selling the water needed to create competitors to defendant in the coal transportation market. The injury plaintiff suffers is "inextricably intertwined" with the injury defendants seek to inflict on coal slurry pipelines and the coal transportation market, and under *Brunswick Corp.*, and *McCready* certainly alleges the type of injury that the antitrust laws were intended to prevent.

Bases for dismissal asserted by defendants which are not discussed herein are found to be without merit.

For the reasons stated herein, and for the reasons stated by Judge Bogue in his Memorandum Decision of July 26, 1984, the defendants' Motion to Dismiss the Amended Complaint herein must be denied.

ORDER DENYING MOTION TO DISMISS

Upon the record herein,

IT IS ORDERED:

(1) That the Motion of Defendants Kansas City Southern Industries, Inc. and the Kansas City Southern Railway Company to Dismiss the Amended Complaint is denied.

(2) That it is my opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an im-

mediate appeal from this order may materially advance an ultimate termination of this litigation, pursuant to 28 U.S.C. § 1292(b).

Dated this 6th day of March, 1986.

BY THE COURT:

/s/ John B. Jones
United States District Judge

ATTEST:

WILLIAM F. CLAYTON
Clerk

By /s/ Linda M. Ziegler
Deputy

[SEAL]

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 83-5046

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,
Plaintiffs,

-vs-

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,
Defendants.

SPECIAL VERDICT

We, the jury, present our answers to questions submitted by the Court, to which we have unanimously agreed.

I. *Plaintiff's claim under Section 1 of the Sherman Antitrust Act.*

(1) Do you find by a preponderance of the evidence that a conspiracy existed between the defendant and one or more railroads to delay, impede, or stop the ETSI pipeline project?

✓ Yes ___ No

If you answered no, please go to question 5.

(2) If you answered yes to question 1, do you find by a preponderance of the evidence that the conspiracy

as described in that question unreasonably restrained trade in the coal transportation market?

✓ Yes ___ No

If you answered no, please go to question 5.

(3) If you answered yes to questions 1 and 2, do you find by a preponderance of the evidence that the conspiracy as described in those questions occurred in or affected interstate commerce?

✓ Yes ___ No

If you answered no, please go to question 5.

(4) If you answered yes to questions 1, 2, and 3, do you find by a preponderance of the evidence that acts in furtherance of the conspiracy as described in those questions injured plaintiff in its business or property?

✓ Yes ___ No

II. *Plaintiff's claim under Section 2 of the Sherman Antitrust Act.*

(Not Answered By Jury)

(5) Do you find by a preponderance of the evidence that a conspiracy existed between the defendant and one or more railroads to monopolize the coal transportation market between the Powder River Basin and the mid-south States?

___ Yes ___ No

If you answered no, please go to question 10.

(6) If you answered yes to question 5, do you find by a preponderance of the evidence that the defendant knowingly became a party to the conspiracy described in that question?

___ Yes ___ No

If you answered no, please go to question 10.

(7) If you answered yes to questions 5 and 6, do you find by a preponderance of the evidence that the defendant entered into the conspiracy to monopolize with the specific intent to obtain or maintain monopoly power in the coal transportation market between the Powder River Basin and the mid-south states?

____ Yes ____ No

If you answered no, please go to question 10.

(8) If you answered yes questions 5, 6 and 7, do you find by a preponderance of the evidence that the conspiracy as described in those questions occurred in or affected interstate commerce?

____ Yes ____ No

If you answered no, please go to question 10.

(9) If you answered yes to questions 5, 6, 7 and 8, do you find by a preponderance of the evidence that acts in furtherance of the conspiracy to monopolize as described in those questions injured plaintiff in its business and property?

____ Yes ____ No

III. *Plaintiff's claim that defendant intentionally interfered with plaintiff's contract with ETSI.*

(10) Do you find by a preponderance of the evidence that the defendant knew of the existence of the contract between the plaintiff and ETSI?

✔ Yes ____ No

(11) If you answered yes to question 10, do you find by a preponderance of the evidence that the defendant's

actions taken after the defendant knew of the existence of the contract described in that question were a proximate cause of the termination of that contract between the plaintiff and ETSI?

✔ Yes ____ No

(12) If you answered yes to questions 10 and 11, do you find by a preponderance of the evidence that the defendant's actions were intentional?

✔ Yes ____ No

(13) If you answered yes to questions 11, 12 and 13, do you find by a preponderance of the evidence that the defendant's actions damaged the plaintiff?

✔ Yes ____ No

IV. *Damages.*

(14) If you answered yes to *all* the questions under Part I above (questions 1 through 4), or if you answered yes to *all* the questions under Part II above (questions 5 through 9), or if you answered yes to *all* the questions under Part III above (questions 10 through 13), what do you find to be the amount of damages plaintiff suffered by reason of the conduct described in those parts, due to the loss of net profits arising from the sale or lease of water rights to ETSI, reduced to their present value and excluding any additional damages set out in questions 15 through 17.

$200,000,000

amount

(15) If you answered yes to *all* of the questions in Part III above (questions 10 through 13), what do you

find to be the amount of the damages plaintiff suffered due to:

$10.9 million	loss of sales, use, contractor's excise tax which would have been generated by the construction of the West River Aqueduct
$8.3 million	prejudgment interest on ETSI contract payments prior to trial

(16) If you answered yes to *all* of the questions in Part III (questions 10 through 13), do you find punitive damages should be awarded to the plaintiff?

✓ Yes ___ No

(17) If you answered yes to question 16, what is the amount of punitive damages to be awarded to the plaintiff?

$25,000,0000

Amount

Dated this 8th day of April, 1988.

/s/ Irvin D. Tryggestad
Foreperson

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Case Number CIV 83-5046

STATE OF SOUTH DAKOTA; SOUTH DAKOTA CONSERVANCY DISTRICT, an Agency of the State of South Dakota,
Plaintiffs,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., a Foreign Corporation; KANSAS CITY SOUTHERN RAILWAY COMPANY, a Foreign Corporation,
Defendants.

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its special verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried and heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

1) That Plaintiffs' Sherman Act, Section 2 Claim is dismissed;

2) That under Plaintiffs' Sherman Act, Section 1 Claim, the Plaintiffs shall recover from the Defendants threefold the sum of Two Hundred Million Dollars ($200,000,000.00) for a total of Six Hundred Million Dollars ($600,000,000.00) all as pro-

vided under 15 U.S.C. Section 15(a), with interest thereon as provided by law, and the cost of suit, including a reasonable attorney's fee in the sum of $2,500,000.00, which sum is to be determined and approved by the Court at a later date and inserted herein, and the costs of this action in the sum of $93,307.39, which sum is to be determined by the Clerk and inserted herein at a later date;

3) That under Plaintiffs' state law tortious interference with contract claim, the Plaintiffs shall recover from the Defendants Two Hundred Nineteen Million, Two Hundred Thousand Dollars ($219,200,000.00), together with Twenty-Five Million Dollars ($25,000,000.00) in punitive damages, with interest thereon as provided by law, and the costs of this action in the sum of $————————, which sum is to be determined by the Clerk and inserted herein at a later date.

4) That Plaintiffs may recover from Defendants damages as set out in either paragraph (2) or paragraph (3) above, but Plaintiffs may not recover damages under both paragraphs.

April 12, 1988

Date

WILLIAM F. CLAYTON
Clerk

/s/ Karen M. Toft
(By) Deputy Clerk

APPENDIX H

Examples of jury instructions on the *Noerr-Pennington* doctrine:

> Plaintiff asserts that defendant and other railroads carried out their conspiracy, in part, by raising environmental and procedural issues in administrative proceedings, and in litigating issues on railroad crossings and environmental permits, and in pursuing the Andrews litigation.
>
> The Constitution and laws of this country ensure the right of everybody, whether acting alone or with others, to petition or appeal to all government agencies for political action, recognizing that when people do so they will naturally seek political action that favors them and may also be unfavorable to others.
>
> The Constitution and laws of this country also ensure the right of everybody, whether acting alone or with others, to petition or appeal to the courts for judicial action, recognizing that when people do so, they will naturally seek judicial action that favors them and may also be unfavorable to others.
>
> Exercise of the rights to engage in proceedings before administrative agencies and to engage in litigation does not violate anti-trust laws even if the purpose of those efforts is to obtain official action that eliminates or reduces competition.
>
> To be entitled to this protection, however, the petitioning activity must be a genuine attempt to influence public officials to take official action. Litigation and administrative activities must be brought for the true purpose of seeking the relief sought therein.
>
> Administrative activities and litigation are not protected if they are just a sham or a pretext to inter-

fere with a competitor simply by invoking governmental processes. Plaintiff must prove that defendant's and other conspirator's involvement in administrative proceedings and litigation concerning the ETSI project were a sham or a pretext before those activities may be found to have been in violation of federal anti-trust laws. In determining whether the petitioning activity is a sham or a pretext you must determine not only what activities the party did but also why it did them.

In regard to the plaintiff's interference with contract claim, the same principles discussed above apply. Genuine petitioning activity is protected from tort liability but petitioning activity that is a sham or pretext to interfere with the competitor by simply invoking governmental process is not protected and may subject the defendant to tort liability. [KCS App. 513A-514A; *see also id.* at 486A, 488A, 555A.]

Supreme Court, U.S.
FILED
DEC 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-724

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF SOUTH DAKOTA, *et al.*, PETITIONERS

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *et al.*, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS KANSAS CITY SOUTHERN INDUSTRIES, INC. AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY IN OPPOSITION

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* Counsel of Record

December 6, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. (a) Whether the Court of Appeals erred in failing to create a new and unique interpretation of § 4 of the Clayton Act in order to grant antitrust standing to the state governmental plaintiffs in this case?

(b) Whether the Court of Appeals correctly applied the test for antitrust standing, established in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), to the facts of this case?

2. Whether this Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988), overruled *sub silentio* this Court's holdings in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and rewrote the legal test for determining when petitioning is sham?

3. Whether the Court of Appeals violated the Seventh Amendment right to a jury trial by reviewing the sufficiency of the evidence on questions for which there was no jury finding?

PARTIES TO THE PROCEEDING

A list of the parties below is contained in the Petition. The following is a statement of the parents, subsidiaries (except for wholly owned subsidiaries) and affiliates of the respondents Kansas City Southern Industries, Inc. and The Kansas City Southern Railway Company, provided pursuant to Rule 28.1 of this Court's Rules:

ALC Communications, Inc.; Argus PMS; Boston Financial Data Services, Inc.; Direct Broadcast Satellite Corp.; Downtown Investors; DST Computer Services S.A.; DST Systems, Inc.; Fast Foto, Inc.; First of Michigan; IDEX Management, Inc.; International Satellite, Inc.; Investors Fiduciary Trust Company; Janus Capital Corporation; Joplin Union Depot Co.; KC Terminal Railway Company; The Lamarck Group; LDX Group, Inc.; Northern Farms, Inc.; Ocean Lagoon Assoc.; Plaza Investors; Port Arthur Bulk Marine Terminal Co.; Rycom Instruments, Inc.; 10 Central Garage Associates; TPM Europe, Inc.; Trailer Train Company; Transaction Services, Inc.; Two Heritage Drive Realty Association; Vantage Computer Systems, Inc.; WilTel/LDX Acquisition Corp.; Winchester Venture I; Winchester Venture II; Wyandotte Garage Corp.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-724

STATE OF SOUTH DAKOTA, *et al.*, PETITIONERS

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *et al.*, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF RESPONDENTS KANSAS CITY SOUTHERN INDUSTRIES, INC. AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY IN OPPOSITION

Respondents Kansas City Southern Industries, Inc. and The Kansas City Southern Railway Company (collectively "KCS") respectfully submit this Brief in Opposition to the Petition of the State of South Dakota and the South Dakota Conservancy District (collectively "South Dakota") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, reported at 880 F.2d 40. *See* SD App. A.

STATEMENT OF THE CASE

South Dakota's factual statement of the case frequently goes beyond the facts found by the jury (*see* SD App. 64a-68a) or supported by the evidence presented to the

jury. KCS does not undertake here to dispel all the misconceptions that might be created by this advocate's account because the facts that South Dakota embellishes are not relevant to the factual points upon which the decision below rests.

A. Statement of the Facts

The complaint in this action was based on an agreement between South Dakota and Energy Transportation Systems, Inc. ("ETSI") under which South Dakota was to be paid for supplying water from the Oahe Reservoir to ETSI. ETSI planned to use the water in the operation of a coal slurry pipeline it contemplated constructing from Wyoming to some point in the south-central United States. ETSI abandoned its plans to construct the pipeline and cancelled its contract with South Dakota in 1984. South Dakota brought this action against KCS seeking the value of that contract as compensatory damages.

ETSI required large quantities of water for its proposed coal slurry pipeline. Initially, ETSI planned to use wells in Wyoming to draw water from the Madison Formation Aquifer, and South Dakota, objecting to this use, actively opposed the pipeline for a number of years. SD App. 3a, 15a. For example, South Dakota filed comments critical of ETSI's Environmental Impact Statement. SD App. 5a. Eventually, however, South Dakota convinced ETSI to switch water sources, and on December 23, 1981, ETSI signed a contract with South Dakota (the "ETSI/South Dakota contract") whereby South Dakota promised to assign ETSI a state water permit and ETSI promised to pay South Dakota, subject to cancellation rights, for its use of Oahe water. Because the Oahe Reservoir is a federal flood control project, ETSI also sought federal approval; in 1982, it signed a water service contract with the Bureau of Reclamation ("BOR") of the Department of the Interior (the "ETSI/BOR contract").

In its complaint, South Dakota alleged that KCS interfered with the ETSI/South Dakota contract by acting together with other railroads to inhibit the construction of ETSI's proposed pipeline. The complaint raised claims under the antitrust laws and for tortious interference with contract under South Dakota law. South Dakota alleged that KCS sent letters, comments and objections to various state, local and federal governmental agencies in opposition to the pipeline, and most notably, that KCS brought a federal lawsuit seeking, *inter alia*, to enjoin the ETSI/BOR contract for the use of Oahe water. KCS and several other private parties filed the lawsuit against ETSI and various officials of the federal government in July of 1982.

At the same time, the States of Iowa, Nebraska and Missouri filed a similar lawsuit also seeking to enjoin the ETSI/BOR contract. The district court consolidated KCS' suit and the States' suit. The consolidated suit—known as the "*Andrews*" litigation—was completely successful. The federal courts concluded that the BOR had no authority to issue ETSI a federal permit to use Oahe water; ultimately this Court unanimously upheld a permanent injunction against execution of the ETSI/BOR contract. *See Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984), *aff'd*, 787 F.2d 270 (8th Cir. 1986), *aff'd sub nom., ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988) ("*Andrews*").[1]

B. The Proceedings Below

The case was tried to a jury for ten weeks in early 1988. The jury returned a verdict in the form of 12 answers to questions posed to it on a special verdict form

[1] The Petition notes that "the District Court [in *Andrews*] ruled that KCS had no standing" to challenge the ETSI/BOR contract. Pet. at 8. The Petition fails to inform the Court that this ruling was later vacated by the District Court and that the Court below found that KCS had a reasonable basis for asserting standing in *Andrews*. *See* SD App. 27a-28a & n.29.

submitted under Fed. R. Civ. P. 49(a). As to the claim under § 1 of the Sherman Act, 15 U.S.C. § 1, the jury found that KCS had acted in concert (with others not specified) to delay or impede the pipeline project, that KCS' conduct resulted in a restraint in the coal transportation market, and that South Dakota's harm was causally connected to KCS' conduct. SD App. 64a-65a. As to the tortious interference claim, the jury found that KCS' actions after it knew of the existence of the ETSI/South Dakota contract (including the *Andrews* litigation) were a cause of ETSI's termination of that contract, and that these acts were intentional and collectively caused harm to South Dakota. SD App. 66a-67a.

Despite KCS' objections, no question was posed to the jury concerning the *Noerr-Pennington* doctrine,[2] and the Court did not instruct the jury to limit its consideration of causation only to conduct unprotected under that doctrine. *See* KCS App. 4a. Consequently, the jury's findings on the verdict form do not address these issues. *See* SD App. 64a-68a.[3]

On the basis of the jury's answers on the special verdict form, including its estimate of the present value of the ETSI/South Dakota contract had it been performed for 50 years, SD App. 67a-68a, the trial court entered judgment against KCS. SD App. 69a-70a.

The Eighth Circuit made three determinations that required the reversal of the judgment. First, the Court

---

[2] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). *The Noerr-Pennington* doctrine exempts from antitrust scrutiny certain petitioning conduct directed to governmental officials notwithstanding the existence of all the elements necessary to constitute an antitrust violation for non-petitioning conduct.

[3] Contrary to the suggestion of the Petition (at 7), the jury never found that KCS' participation in *Andrews* (or any other petition) was sham, or that sham activity proximately caused South Dakota injury. *See* discussion below at 25-26.

determined that South Dakota had no standing to pursue its antitrust claim under § 4 of the Clayton Act, 15 U.S.C. § 15. The Court identified six standing factors articulated in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), and applied those factors to the facts of this case. SD App. 10a-20a.

The Court then dismissed the state law claim for tortious interference with contract for two independent reasons. Based on the record below, the Court held that, as a matter of law, KCS' activities from the date the contract was signed until the date of its cancellation [4]

> (1) had no significant or proximate causal relation to the cancellation by ETSI of the [South Dakota]/ ETSI contract, and, even if they did contribute to the cancellation of the contract, (2) KCS' activities in the *Andrews* litigation were protected by the *Noerr-Pennington* doctrine.

SD App. 27a. In making the first determination relevant to the tort claim—that South Dakota failed to prove proximate causation as a matter of state tort law—the Court observed that the record was clear that "the district court's decision in *Andrews* was the single most important event immediately preceding the termination of the ETSI coal slurry pipeline project." SD App. 25a. The Court concluded that the *Andrews* decision and any effects of the suit were independently caused by the States of Iowa, Missouri and Nebraska, without regard to KCS' participation. SD App. 28a.

As an alternative to this holding, the Court considered whether KCS' participation in *Andrews* could have been "improper" under South Dakota tort law. The Court held that petitioning of the government could not be "improper" under state law—and thus could not serve as the

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[4] The parties agreed that KCS' pre-contractual conduct could not serve as a basis for liability for tortious interference with contract. *See* SD App. 24a-25a, 36a.

basis for tort liability—unless it were "sham" under the *Noerr-Pennington* doctrine. SD App. 21a-23a. The Court held that KCS' *Andrews* petition, as a matter of law, was not sham because there was no evidence that KCS participated in *Andrews* without sincerely intending to obtain judicial relief. SD App. 28a-31a.

The Court of Appeals denied South Dakota's request for rehearing or rehearing *en banc*.

REASONS FOR DENYING THE PETITION

The Petition for Certiorari criticizes, directly or obliquely, every aspect of the Eighth Circuit's opinion. These criticisms are not confined to matters raised in or decided by the Court below; many are either mentioned for the first time in the Petition or are directed at questions not presented by the Eighth Circuit's decision. None of the bases of that decision presents an important and controversial question of federal law, addresses an issue as to which a conflict exists in the lower federal courts, or conflicts with any decision of this Court. As to each question, the Court of Appeals for the Eighth Circuit applied the law as articulated by this Court and as it has uniformly been applied by other Courts of Appeals. The Court of Appeals directed that judgment be entered for KCS only because the record supports no other result. Review by this Court is not warranted.

I. THE DECISION BELOW APPLIED SETTLED PRINCIPLES OF ANTITRUST STANDING

A. The Court Below Properly Treated South Dakota In The Same Manner As Other Plaintiffs Proceeding Under § 4 Of The Clayton Act

South Dakota begins its argument by making a suggestion not previously raised in any brief filed in this action—that a state seeking to recover for commercial

injury should not be bound by the same legal standard [5] as other "persons" proceeding under § 4 of the Clayton Act, 15 U.S.C. § 15. South Dakota apparently now believes that "the status of a state *broadens* the scope of its commercial interests deserving of protection under the antitrust laws." Pet. at 12 (emphasis in original). The Eighth Circuit not surprisingly applied the same law to South Dakota as it would to any "person" seeking recovery under § 4 of the Clayton Act. *See, e.g., Georgia v. Evans*, 316 U.S. 159, 162 (1942) (Georgia is a "person" under the antitrust laws, entitled to "the civil remedy of treble damages which is available to *other purchasers* who suffer through violation of the [Sherman] Act") (emphasis added).

In support of its claim that the Eighth Circuit erred in failing to create a new rule of law affording it a special "status" under the federal antitrust laws, South Dakota cites not a single case or excerpt of legislative history, and provides no analysis of the language of § 4 of the Clayton Act. Section 4 simply provides its protections to "person[s]" injured in their "business or property;" it does not purport to give states any greater or lesser "commercial" rights than it provides other persons. South Dakota's *ipse dixit* assertion that the commercial interests of states are somehow broader than those of private, purely commercial plaintiffs is a *non sequitur*: the existence of *non*-commercial (*i.e.*, sovereign) interests offers no logical ground for recognizing a broader commercial interest.[6] The only case South Dakota cites concededly

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[5] At argument before the Eighth Circuit, South Dakota attempted to point out factual differences between itself and other suppliers; it never argued for or articulated a different *legal standard* for state governmental antitrust plaintiffs.

[6] That a state may have "special status . . . under the Constitution" (Pet. at 11) does not support the proposition that states have broader rights under § 4 of the Clayton Act. If anything, states

does not support its argument. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972) ("*Hawaii*") (states may not recover as *parens patriae* for injury to their non-commercial interests). South Dakota does not even hint at what it believes the legal standard for antitrust standing for states should be—other than to note that it would be "broade[r]" than that for private entities—or explain whether it would meet such a standard.

At most, South Dakota can suggest only that this Court use the present case as a vehicle to reconsider the *Hawaii* opinion. Pet. at 12. This case does not, however, present the issue decided in *Hawaii*. The Court of Appeals below did not cite *Hawaii* or rely on the decision in any manner; nor did it hold that South Dakota lacked standing to recover for injury to its sovereign interests—as this Court did in *Hawaii*. Rather, it held that South Dakota did not have standing to recover for injury in its commercial capacity because it failed the general antitrust standing test of *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). *See* discussion below at 9-13.

To the extent a state should possess any special status under the federal antitrust laws, Congress has already struck that balance by enacting the specific *parens patriae* provisions of § 4C of the Clayton Act, 15 U.S.C. § 15c. South Dakota sought to proceed *parens patriae* in the district court, but that aspect of its suit was dismissed (SD App. 47a-51a), and that ruling was not appealed. The Court of Appeals therefore had no occasion to consider that ruling, which in any event was correct. That Congress has made special provision for states

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are less dependent on federal remedies than private plaintiffs. States are uniquely situated to fashion and pursue their own causes of action directed at particular conduct, as South Dakota pursued its tort claim here.

through legislation (in the enactment of § 4C) undermines the notion proposed by South Dakota that this Court by decision should make further special provision for the states by inventing a new construction of § 4 for their unique benefit. There is no reason for this Court to disturb the enforcement structure created by Congress, and South Dakota makes no attempt to offer one.

Finally, South Dakota's unhappiness with the level and focus of federal antitrust enforcement (*see* Pet. at 12) should be addressed to another forum; this dissatisfaction has little to do with whether this Court should expand the availability of a private federal damage remedy for the peculiar benefit of state governmental entities. Federal enforcement efforts undoubtedly do shift from time to time. This Court cannot be expected to adjust the scope of the § 4 remedy each time a perceived shift occurs. South Dakota cannot reasonably or logically complain because under § 4 of the Clayton Act it is held to the same standards as everyone else.

B. The Court Below Applied The Proper Legal Test To Determine Antitrust Standing And Did Not Give Dispositive Weight To Any One Factor

In its second attack on the Eighth Circuit's standing analysis, South Dakota argues that the Court of Appeals misapplied the analysis of *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*Associated General Contractors*"). South Dakota does not allege that the Court of Appeals failed to identify the proper elements of that analysis. South Dakota's only real complaint is that the Court below applied the correct law to the facts, weighed the legally relevant factors, but reached what South Dakota regards as the "incorrect" result. This Court should decline the invitation to delve into what South Dakota candidly admits is a "fact-intensive inquiry" (Pet. at 13).

South Dakota attempts to convert this factual inquiry into a legal issue, asserting that the Court below committed "clear error" by giving "decisive effect" to one of the several factors identified by *Associated General Contractors*: the fact that South Dakota was not a participant in the market relevant to its antitrust claim. KCS allegedly caused a decrease in competition in the coal transportation market. South Dakota now appears to concede (as the record below demonstrates, *see* SD App. 15a-17a) that it was not a participant in that market, *i.e.*, it neither bought nor sold coal transportation services; it was neither a consumer nor a competitor in that market. South Dakota contends that the Court of Appeals improperly treated this "single issue" as dispositive and "ignored other significant factors." Pet. at 13.

South Dakota has markedly mischaracterized the decision below. South Dakota can cite no portion of the decision showing that the Court gave any single factor decisive effect, because the Court did nothing of the sort. In discussing the absence of South Dakota's participation in the relevant market, the Court expressly stated that this factor is *not* dispositive, citing the very precedent on which South Dakota now relies:

> The antitrust laws were enacted for "the protection of *competition*, not *competitors*." [citation omitted] (original emphasis). This does not mean that the statute confines its protection solely to consumers, competitors, buyers, and sellers. [*Blue Shield of Virginia v.*] *McCready*, 457 U.S. at 472 (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). *See also Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 (6th Cir. 1983) (finding that plaintiff is not direct participant in relevant market not dispositive of section 4 standing issue).

SD App. 14a n.16. Although the Eighth Circuit notes—consistent with this Court's instructions[7] and the views

[7] *See Associated General Contractors*, 459 U.S. at 539.

of other circuits—that a party's lack of participation in the relevant market "must be weighed heavily against a grant of standing," the Court remained cognizant of the fact that "[s]tanding determinations must be made on a case by case basis." SD App. 14a n.16.

Consequently, South Dakota's lack of participation in the market restrained was not the only factor the Court below considered and addressed. The opinion of the lower court addresses in some measure *each* of the factors it derives from *Associated General Contractors*. The opinion lists six factors:

> (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) the existence of an improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness of the connection between the injury and the alleged restraint in the relevant market; (5) the speculative nature of the damages; and (6) the risk of duplicative recoveries or complex apportionment of damages.

SD App. 12a. The decision below assumes *arguendo* that the first two of these factors weighed in South Dakota's favor. *See* SD App. 12a-13a (assuming "that South Dakota's injuries were in some way causally connected to KCS' allegedly anticompetitive conduct") and SD App. 13a ("for the purposes of our analysis, we grant the assumption that KCS' activities were improperly motivated").[8] As to the last two factors, the panel suggests

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[8] South Dakota exaggerates the significance of the second factor with the misleading statement that "[c]ancellation of the *contract* . . . became a principal objective of KCS' campaign." Pet. at 11 (emphasis added). There were *two* water contracts. Although KCS sought to invalidate ETSI's contract with the *Bureau of Reclamation*, KCS did not sue South Dakota in *Andrews* nor assert there that ETSI's contract with *South Dakota* was unlawful. Thus, KCS' "principal objective" was judicial invalidation of ETSI's federal, not state, contract.

these weighed in KCS' favor. *See* SD App. 13a-14a & n.15 (discussing the presence of more directly injured plaintiffs, which creates a risk of duplicative recovery) and SD App. 19a n.20, 26a-27a n.28 (discussing the highly speculative character of South Dakota's derivative damage claim).[9]

Given this relative balance among these four factors, the panel necessarily focused carefully on the remaining two: "whether the injury was of a type that Congress sought to redress with the antitrust laws," and "the directness of the connection between the injury and the alleged restraint in the relevant market." SD App. 12a. Following this Court's decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), and *Associated General Contractors*—as well as decisions of other Courts of Appeals—the panel determined that South Dakota's lack of a direct economic stake in the extent or intensity of competition in the coal transportation market weighed heavily against its standing to recover treble damages for an alleged restraint in that market, and that South Dakota was in no different posi-

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[9] Rearguing this point, South Dakota asserts that "the damages were in effect fixed by contract and easy to calculate" without "complex apportionment." Pet. at 15. The Eighth Circuit explained, however, that the ETSI/South Dakota contract did not "fix" South Dakota's damages because the contract's various cancellation rights made it "terminable at ETSI's will." SD App. 26a n.28. *See also* SD App. 7a, 17a. To determine South Dakota's injury, the jury needed to ascertain whether ETSI would have exercised its cancellation rights, which depended on how successful the project would have been. The Court below described what an exceedingly complex task this determination would be based on the record below, finding the existence of facts critical to South Dakota's 50-year damage theory to be "entirely speculative." SD App. 26a-27a n.28. Although the Court discusses the complexities of South Dakota's damage theory primarily in its tort analysis, SD App. 27a n.28, it summarizes these same concerns in its standing analysis. *See* SD App. 19a n.20.

tion than any other prospective supplier of inputs to ETSI, *e.g.*, pipe suppliers, banks or labor unions. SD App. 14a-20a. South Dakota concedes, as it must, that "[d]irect participation by the plaintiff in the restrained market may be an important factor" in according antitrust standing (Pet. at 13); given all the factors of this matter, the lack of such participation necessarily became an important factor in this case.

In the end, the objection is that the Court of Appeals was unpersuaded that South Dakota should have been accorded standing because, factually, it could have been regarded as an important supplier to ETSI. By any measure, this is an entirely fact-specific issue unique to this action, and is hardly appropriate for this Court's review.

II. THE DECISION BELOW APPLIED SETTLED PRINCIPLES OF *NOERR-PENNINGTON* LAW

In straining to justify this Court's review of issues concerning its state tort claim, South Dakota mischaracterizes the holding of the Eighth Circuit in this case and the case law governing *Noerr-Pennington* generally. First, the Eighth Circuit's *Noerr* holding was alternative to its causation holding that KCS' activities did not proximately cause South Dakota's injury. The States of Iowa, Nebraska and Missouri independently caused any harm inflicted by the *Andrews* litigation, and there is simply no evidence that non-*Andrews* petitioning pursued after December 23, 1981 caused the cancellation of the contract. SD App. 28a, 37a. The decision's own characterization of its holding demonstrates—contrary to South Dakota's suggestion, *see* Pet. at 18 n.17—that lack of proximate cause is a fully sufficient basis for dismissal of the tort claim. *See* SD App. 26a-27a ("We hold as a matter of law that KCS' activities . . . (1) had no significant or proximate causal relation to the cancellation by ETSI of the [South Dakota]/ETSI contract."); SD App. 28a

("This [causation] determination renders KCS' motive in pursuing its right to join in the [*Andrews*] suit *irrelevant*.") (emphasis added).[10] Grounded in state law, the Court's holding provides an adequate and independent basis for dismissing the tort claim. Thus, the *Noerr-Pennington* holding is not necessary to the result reached below.

Second, even if it were relevant to the result, the particular basis for the Eighth Circuit's *Noerr-Pennington* ruling does not conflict with the decisions of this Court or any other Court of Appeals. The Court below held that KCS' *Andrews* petition was protected as a matter of law because the record evidence concerning KCS' subjective intent was insufficient to satisfy the uniform test for sham intent. The Court did not apply any rule, "absolutist" or otherwise, looking to the objective merit of KCS' petition. To the extent any decisional conflict exists regarding such

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[10] The Court below did not "recognize," as South Dakota claims, Pet. at 18 n.17, that KCS' efforts in *Andrews* "went beyond assertion of its own standing." Noting that another railroad had financially assisted the State of Nebraska in *Andrews*, the Court below stated: "[*a*]*ssuming* the record would support a similar factual finding with regard to KCS in the present case, we move to the second ground of our holding," *i.e.*, the one based on *Noerr*. SD App. 29a (emphasis added). For the *Noerr* ruling to be necessary to the judgment, such a factual finding would have to be made, not "assum[ed]." The jury was not asked to make and made no finding whether KCS proximately caused the States of Iowa, Nebraska and Missouri to pursue their *Andrews* petition, nor whether the States' decision to litigate was the result of a "conspiracy" with KCS. South Dakota did not argue for such a finding in its Petition, nor would the record support such a finding.

Additionally, although the Court below did not "pass" on the specific issue of South Dakota's right to market Oahe water without Army approval, SD App. 26a n.28, *see also* SD App. 16a n.17, the Court did pass on the sufficiency of South Dakota's proof of damages. After extended discussion, the Court concludes: "We . . . find that the jury's award of damages [was] in no way supported by substantial evidence in the record." SD App. 27a n.28.

a rule, it is not implicated by or relevant to the decision in this case.

A. There Is No Conflict Over The Element Of Intent Necessary To Prove Sham Petitioning

South Dakota attempts to manufacture a conflict between this Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S.Ct. 1931 (1988) ("*Allied Tube*"), and the decisions of several circuits, including the decision below, regarding the element of intent necessary to prove sham petitioning. South Dakota essentially concedes that the Courts of Appeals apply a uniform rule that protects petitioning, notwithstanding anticompetitive motive, as long as the petitioner sincerely intended to persuade governmental officials.[11] Nor does

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[11] Plaintiffs make no claim of a circuit conflict, but cite, as *consistent* with the Eighth Circuit rule applied below, decisions from the Fifth, Sixth and Ninth Circuits. Pet. at 18-19. Under its reading of *Allied Tube*, South Dakota challenges not only the holdings of those Circuits, but of every other Court of Appeals. *See Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 488 (1st Cir. 1988) (petition protected "'even though intended to eliminate competition'"), *cert. denied*, 109 S. Ct. 789 (1989); *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330, 1335 (10th Cir. 1988) (petition protected "even if its goals are anticompetitive"), *cert. denied*, 109 S. Ct. 817 (1989); *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948, 954 (11th Cir. 1986) (petition right exists "even if [petitioner] only had an anti-competitive motive"); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 791 F.2d 288, 292 (4th Cir. 1986) (petition protected "'even though intended to eliminate competition'"); *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1156 (7th Cir.) ("'Without a doubt, the intention to harm a competitor is *not* sufficient to make litigation . . . a sham. That anticompetitive motive is the very matter protected under *Noerr-Pennington*.'"), *cert. denied*, 464 U.S. 891 (1983); *Litton Systems, Inc. v. American Tel. and Tel.*, 700 F.2d 785, 806 (2d Cir. 1983) ("anticompetitive intent [does] not make an otherwise legitimate attempt to secure governmental action . . . illegal"), *cert. denied*, 464 U.S. 1073 (1984); *Federal Prescription Service v. American Pharm. Ass'n*, 663 F.2d 253, 262 (D.C. Cir. 1981) ("Anticompetitive intent alone is not enough"), *cert. denied*, 455 U.S. 928

South Dakota deny that this uniform rule is consistent with this Court's decisions in *Noerr* and *Pennington*. Instead, South Dakota argues that, in 1988, *Allied Tube* "definitively rejected" this test for sham intent and authorized a finding of sham petitioning even where the petitioner sincerely intended to persuade a governmental official. Pet. at 19. Based on its novel reading of *Allied Tube*, South Dakota argues that a "sham" determination requires some undefined consideration of both the intent to persuade *and* anticompetitive motive. Pet. at 20.

South Dakota has only lately come to this view of *Allied Tube*. In the Court below, South Dakota advocated the precise rule it now attacks,[12] and informed the Eighth Circuit that *Allied Tube* stated "*the same standard* that has been applied in this circuit with respect to the sham exception." Appellees' And Cross-Appellants' Brief, at 30 ("SD Brief below") (emphasis added). South Dakota's current reading mischaracterizes the decision. Properly understood, *Allied Tube* presents no conflict with *Noerr* or *Pennington*, but supports the uniform rule of sham intent embraced by the decision below.

In *Noerr* there was no question but that the defendants had an anticompetitive motive: the trial court there found that the railroad defendants' "*sole* purpose" was "to destroy the truckers as competitors." 365 U.S. at 138 (emphasis added). Nonetheless, this Court reasoned that "it is neither unusual nor illegal for people to seek action on

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(1982); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1281-82 (3d Cir. 1975) (rejecting claim that *Noerr* protected petitioning "only where there was not a specific illegal intent or purpose inherent" in the petition).

[12] Quoting Eighth Circuit precedent, South Dakota informed the Court below that "'[t]he essential element of the sham exception . . . is an absence of a genuine effort to influence government.'" SD Brief below, at 30 (ellipses in original). Nor did South Dakota urge its new reading of *Allied Tube* upon the Eighth Circuit in its petition for rehearing.

laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors," and held that "at least insofar as the [defendant] railroads' campaign was directed toward obtaining governmental action, its legality was not *at all* affected by any anticompetitive purpose it may have had." 365 U.S. at 139-40 (emphasis added). The Court raised and rejected the applicability of a "sham" exception, noting simply that "[n]o one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices." *Id.* at 144. In *Pennington*, the Court reviewed the decision in *Noerr* and stated: "*Nothing could be clearer* from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. 669-70 (emphasis added).[13] *Noerr* and *Pennington* refute the claim that anticompetitive motivation is ever sufficient to prove petitioning sham.[14]

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[13] In contrast, this Court held that a complaint may state an antitrust claim based on the sham exception where "the allegations are *not* that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511-12 (1972) (emphasis added). This case simply does not stand for the proposition South Dakota believes it reflects. Pet. at 23.

[14] Properly understood, there is no conflict or trade-off between the legitimate intent to influence governmental action and the motive to harm competitors. One can fully intend to procure favorable governmental action for the sole purpose of harming a competitor; such a "mix" of intent and motive is what *Noerr-Pennington* protects. A petition is sham when the petitioner lacks the intent to influence governmental action, and intends to injure a competitor merely by the existence, rather than the outcome, of the petition. *See* P. Areeda & H. Hovenkamp, Antitrust Law, ¶¶ 203.1a, 203.1c, at 16, 19 (Supp. 1989).

In *Allied Tube*, this Court was *not* presented with an application of the sham exception to petitioning activity presumptively protected by *Noerr*, but the threshold question whether *Noerr* protection applied at all, given the nature and context of the activity challenged. The defendants in *Allied Tube* had not communicated directly with government officials (*e.g.*, by filing pleadings with a court), but had instead exercised "decision-making authority" in formulating a product standard for electrical conduits for a private trade association (by "packing" the association with pre-committed voters). 108 S.Ct. at 1935, 1942. This Court immediately noted that the case did not present a question of whether the petitioning of public officials was sham,[15] but whether the defendants' efforts to influence *private* persons (other members of the trade association) could be properly characterized as "incidental to" an effort to influence governmental action. *Id.* at 1937-38.

Recognizing that their private efforts to influence trade association members were not traditional "petitioning," the defendants advocated an "absolutist position" that *any* conduct—including private efforts to influence private persons—is protected if it is genuinely intended eventually to influence governmental action. *Id.* at 1938. The Court rejected *this* absolutist position, noting that it might legitimize all sorts of private non-petitioning acts—even horizontal price-fixing—because of a potential motivation "ultimate[ly]" to influence governmental decisions. *Id.* at 1938-39. Because it decided that the private restraint imposed by the trade association was not "incidental to" an effort to petition governmental officials, the Court had no occasion to apply the sham exception. Thus, *Allied Tube* does not affect *Noerr*'s protection of conduct that is indisputably "petitioning," *i.e.*, direct communications

[15] "The effort to influence governmental action in this case certainly cannot be characterized as sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances." 108 S.Ct. at 1938.

with government officials. *See id.* at 1942 (defendants "can, with full antitrust immunity, engage in concerted efforts to influence those governments through *direct* lobbying") (emphasis added).[16]

To the extent *Allied Tube* addressed the sham exception in dicta, it reaffirmed the settled understanding of sham intent. The Court criticized the dissent for its willingness to find that defendants' private conduct there was "incidental to" an effort to influence the government, while reserving the sham exception to guard against "flagrant abuse." *Id.* at 1941 n.10. Citing *Noerr*, the majority noted: "Such a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover *activity that was not genuinely intended to influence governmental action.*" *Id.* (emphasis added). *See also id.* at 1937 n.4 ("private action that is not genuinely aimed at procuring favorable governmental action is a mere sham"). The Court below properly relied on this dictum of *Allied Tube* in describing the scope of the sham exception. SD App. 23a (citing *id.* at 1937 n.4).

Allied Tube did not alter in the least *Noerr*'s test for sham intent. It would have been remarkable for this Court to have "definitively rejected" (Pet. at 19) its decisions in *Noerr* and *Pennington* and the uniform understanding of the Courts of Appeals on the test for sham intent without explicitly expressing its disapproval of those decisions. *See, e.g.*, 108 S.Ct. at 1936 (citing *Noerr* and *Pennington* with approval). South Dakota's remarkable reading of *Allied Tube* is contradicted by a proper reading of the case, by subsequent decisions and commen-

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[16] While disagreeing over the application of *Noerr* to the conduct at issue in *Allied Tube*, the dissent there noted this common ground with the majority. Even "the majority concedes" that business concerns could communicate directly to government officials "with impunity . . . even though they had anti-competitive motives in doing so." 108 S. Ct. at 1944 (White, J., dissenting).

tary interpreting *Allied Tube*,[17] and even by South Dakota's previous interpretation expressed to the Court below.

In the present case, South Dakota has never denied that KCS' activities in the *Andrews* litigation constituted direct "petitioning" of public officials to which the *Noerr-Pennington* doctrine applied. South Dakota's sole claim for KCS' liability for *Andrews* has always been its attempt to invoke the sham exception to *Noerr* immunity. The Court below simply applied the uniform test for sham to the facts presented, and found *Andrews* protected because KCS indisputably desired judicial relief. SD App. 31a.[18]

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[17] Apparently, South Dakota can locate no case embracing its view of *Allied Tube*. To the contrary, *see Smith v. Combustion Engineering*, 1988-2 Trade Cas. (CCH) ¶ 68,224, at 59,448 (6th Cir. 1988) (not for publication) ("*Allied Tube* does not speak to the present case, where the defendants resorted to the courts."), *cert. denied*, 109 S. Ct. 1316 (1989); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 488 (1st Cir. 1988) (contrasting *Noerr*, concerning "'efforts to influence *public* officials,'" with *Allied Tube*, concerning "efforts to influence *private*" organizations) (original emphasis), *cert. denied*, 109 S. Ct. 789 (1989); *Aurora Cable Communications, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600, 602 (W.D. Mich. 1989) (citing *Allied Tube*, yet still holding *Noerr* protects petitioning "regardless of . . . anticompetitive intent or purpose to eliminate competition"). *See also* P. Areeda & H. Hovenkamp, Antitrust Law, ¶¶ 202, 206.2, at 14-16, 77-83 (Supp. 1989); 6 Von Kalinowski, Antitrust Laws and Trade Regulation § 46A.04, at 46A-26. Neither treatise reads *Allied Tube* as "definitively rejecting" (Pet. at 19) prior law.

[18] Sham intent is the absence of a desire to influence governmental action, *i.e.*, indifference to the outcome of the petition. The Court below did not actually hold, as South Dakota suggests, that *any* level of concern with the outcome protects a petition, but that *Andrews* was protected as a matter of law because "a *significant factor* in [KCS'] pursuing the action was the desire to obtain judicial relief." SD App. 31a (emphasis added). The Court did not address the possibility of a *de minimis* desire to obtain relief combined with an overriding indifference to the outcome of the litigation. Any legal rule for such a case would not affect the outcome of this case.

B. The Court Below Did Not Apply An "Absolutist" Rule Based On The Success Of A Petition

South Dakota asserts that there is a conflict among the circuits over the scope of the sham exception to the *Noerr-Pennington* doctrine. As demonstrated in the prior section, no conflict exists concerning the basis for the decision below: that petitions sincerely intended to persuade governmental officials cannot be the basis for liability. *See, supra*, n.11. To the extent that any conflict or potential conflict exists on any other issue—such as the relevance of the objective merit of the petition—it is irrelevant to the ruling below. The Eighth Circuit did not rely on, or even approve, any "absolutist" rule that "reasonable or successful litigation cannot be a sham." Pet. at 21. Even if this Court were to adopt the contrary rule that South Dakota urges—that successful suits can be sham—it would not alter the result reached below.

The Court below expressly avoided relying on the *per se* rule that petitioners attack. The decision specifically disavows the rule "that successful litigation shall categorically preclude a finding of sham." SD App. 30a n.30.[19] To the contrary, the Court below made abundantly clear that the ultimate basis of its holding was not the objective merit of KCS' petition, but KCS' subjective intent in petitioning: "[W]e must hold that no evidence exists in the record in this case to suggest that KCS did not possess the intent to succeed in the *Andrews* litigation." SD App. 31a. *See also* SD App. 30a n.30 ("[T]here really is no dispute that, regardless of its motive, KCS genuinely sought judicial relief."); SD App. 31a ("There is

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[19] At this point, the Court below quotes extensively and *with approval* from a Seventh Circuit case, *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), a decision with which South Dakota suggests the decision below conflicts. Pet. at 21.

no evidence to prove that KCS' involvement in the *Andrews* litigation following December, 1981, was not significantly motivated by a desire to prevail on the merits."). Although the Court noted that KCS' *Andrews* petition had a "reasonable basis," SD App. 31a, it had no occasion to give this obvious fact dispositive significance, or to assign it *any* degree of significance, because of its holding regarding KCS' intent.[20]

At most, South Dakota can claim that the Court below "invoked" an Eighth Circuit case, *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484 (8th Cir. 1985), that attached some significance to the fact of success. Pet. at 21. Although the Court "invoked," *i.e.*, cited, *Razorback*, it most manifestly did not rely on the case for its holding. Immediately following the citation, the Court (a) expressly disavows a categorical rule that success bars a finding of sham, SD App. 30a n.30, and (b) states that "even if [it] were to apply [South Dakota's] interpretation of the Fifth Circuit's analysis" in *In re Burlington Northern, Inc.*, 822 F.2d 518, 528 (5th Cir. 1987), *cert. denied sub nom., Union Pacific R.R. v. Energy Transportation Systems, Inc.*, 484 U.S. 1007 (1988) ("*Burlington Northern*")—a case expressly holding that successful litigation *can* be sham—KCS' *Andrews* petition is still fully protected by *Noerr*. SD App. 30a-31a. The express basis for this holding is KCS' subjective intent, there being "no evidence" that KCS did not intend to prevail in *Andrews*. SD App. 31a.

South Dakota's claim that the decision below conflicts with the Fifth Circuit's decision in *Burlington Northern* is, consequently, untenable. Ruling on a pre-trial discovery order, the Fifth Circuit there held that successful

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[20] For the purposes of its opinion, the Court below did not even consider KCS to be "one of the successful parties" in *Andrews*. SD App. at 28a.

litigation *could* be sham *if* a plaintiff proved that the petitioner had lacked a desire to prevail as a significant motivating factor. *Burlington Northern*, 822 F.2d at 528. The Court below expressly accepted South Dakota's reading of that case, and still found *Andrews* protected because there was no evidence of sham intent. SD App. 30a. *See also* SD App. 28a-30a (decision below repeatedly citing *Burlington Northern* with approval). After stating the relevant test, *Burlington Northern* did not consider whether KCS did, in fact, desire to obtain judicial relief in *Andrews*. *Burlington Northern*, 822 F.2d at 528. There is, therefore, no conflict between *Burlington Northern* and the Eighth Circuit's finding, based on the specific voluminous record before it, that there was no evidence of sham intent.[21]

Because the Court did not rely on (or even approve) an "absolutist" rule that success bars a finding of sham, there is no conflict with South Dakota's interpretation of *California Motor, Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983) (*"Clipper Exxpress"*), or any other case cited by South Dakota. None of these cases holds that litigation genuinely intended to prevail can be sham, and therefore, none of the cases is inconsistent with the holding below. In *California Motor*, the Court upheld the sufficiency of a complaint that alleged, *inter alia*, that the defendants brought repetitive suits "'with or without probable cause,'" 404 U.S. at 512, *i.e.*, with indifference to the outcome. Such facts were

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[21] Even if there were conflicting factual determinations on the same *events*, they would not have been made on the same *record*. In contrast to the 10-week trial record before the Court below, "in *Burlington Northern* the parties were merely at the pre-trial stage and the Court was appraising sham litigation in terms of whether there was sufficient evidence . . . to allow discovery as to KCS' intent." SD App. at 30a. *See also Burlington Northern*, 822 F.2d at 522.

simply not proven in the present case where the Court found "no evidence" that KCS' *Andrews* petition "was not significantly motivated by a desire to prevail on the merits." SD App. 31a.[22]

Finally, South Dakota can cite nothing in the decision below for its baseless claim that the Eighth Circuit "immunized KCS' *entire* course of conduct on the basis of *one* 'successful' piece of litigation." Pet. at 22 (emphasis in original). Having avoided holding that the success of a petition does not bar a finding of sham as to that petition, *a fortiori* the Eighth Circuit did not hold that success on one petition bars liability for other unsuccessful petitions, or that success on one petition insulates related non-petitioning conduct from liability. The Court made no *Noerr* determination for any of KCS' conduct except *Andrews*.[23]

There is absolutely no basis for South Dakota's characterization of the holding below as providing an "absolutist" treatment of success. In its comprehensive search for a question that might conceivably meet this Court's criteria for granting review, South Dakota has ignored

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[22] *Clipper Exxpress* simply does not hold that "otherwise-protected litigation which is part of an overall anticompetitive scheme is not entitled to *Noerr-Pennington* immunity." Pet. at 23. Even the language South Dakota quotes makes clear that the Ninth Circuit is only rejecting a claim of "overall" immunity; it held that the defendants' *non-petitioning* "actions do not enjoy immunity, even though a part" of an overall anticompetitive scheme including protected petitioning. *See* 690 F.2d at 1265.

[23] Pre-December, 1981 conduct could not provide any basis for tort liability because, as South Dakota has conceded, KCS could not tortiously interfere with its contract with ETSI before the contract existed, and the contract did not exist until December 23, 1981. *See* SD App. 24a-25a. Nor does the Court anywhere determine whether KCS' post-1981, non-*Andrews* petitioning activity was protected by *Noerr*. No such determination was necessary because the Court held that KCS' post-1981 activities "had no significant or proximate causal relationship" to South Dakota's alleged injury. SD App. 27a.

the fundamental requirement that the decision below must have actually decided the question petitioners present.

III. THE COURT BELOW NECESSARILY AND CORRECTLY REVIEWED THE SUFFICIENCY OF THE EVIDENCE REGARDING DISPOSITIVE ISSUES

South Dakota also attacks the Court of Appeals' reversal of the tort judgment for its analysis of the record below with respect to the sufficiency of evidence (a) as to whether *Andrews* could be considered sham litigation, and (b) as to whether any of KCS' post-1981 non-*Andrews* petitioning was a proximate cause of ETSI's decision to terminate its contract with South Dakota. Attempting to create a significant "legal" issue out of these fact-intensive inquires, South Dakota raises the specter of a Seventh Amendment violation, claiming that the Eighth Circuit gave insufficient weight to jury findings on these issues. South Dakota's constitutional claim is wholly groundless. First, there are no jury findings on these issues because South Dakota objected to the necessary instructions and interrogatories. Second, even if there were such findings, the Court would have been entirely justified in setting them aside for lack of sufficient evidentiary support.

The trial court elected to seek a special verdict from the jury, rather than a simple general verdict or a general verdict accompanied by answers to special interrogatories. *See* Fed. R. Civ. P. 49(a). The jury found only those facts it reported in answering the questions on the special verdict form, and made no general finding of liability. *See* SD App. 64a-68a. None of its answers includes a finding that KCS' petitioning was sham. KCS repeatedly asked the trial court to submit a question to the jury asking whether any or all of KCS' petitioning activity was sham. South Dakota *objected* to the inclusion of such a question, and the trial court, opining that "a decision on this *Noerr-Pennington* issue would not be dispositive," refused it. *See* KCS App. 1a-3a (refused

CONCLUSION

South Dakota has repeatedly misstated the basis for the decision below. Properly understood, the Court below only applied the settled law on each issue to the facts presented in the record, resolving any close legal questions in South Dakota's favor. There is no reason for this Court to review settled principles on which the decision rests, or other issues South Dakota presents on which the decision does not rest.

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December 6, 1989

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petitioning activity, sham or not, was the proximate cause (in a "but-for" sense required by state law) of the cancellation of the Oahe water contract. The most South Dakota can assert in its Petition, without citation or support, is that there was some evidence that KCS' post-1981, non-*Andrews* petitioning activities "*contributed* to the harm to South Dakota." Pet. at 27 (emphasis added). Even if an exhaustive analysis of the entire record supported this carefully stated proposition, which KCS disputes, it would not cast the decision below in doubt; such a determination (never made by the jury) would in any event be insufficient to establish proximate cause under South Dakota tort law.

APPENDICES

APPENDIX A

DEFENDANTS' FINAL WRITTEN SUBMISSION CONCERNING JURY INSTRUCTIONS, FORM OF VERDICT AND INTERROGATORIES

[Refused orally by Judge John B. Jones at charge conference on March 31, 1988]

* * * *

Question 3: *Noerr-Pennington* and the sham exception

3. Do you find that plaintiffs have proved or failed to prove, by a preponderance of the evidence:

(A) That KCS's comments on ETSI's Environmental Impact Statement ("EIS") were *not* genuinely intended by KCS to pursuade the Bureau of Land Management to rule against ETSI?

Proved _____
Not Proved _____

(B) That KCS's defense of lawsuits brought by ETSI was *not* genuinely intended by KCS to persuade the Oklahoma court to rule against ETSI?

Proved _____
Not Proved _____

(C) That KCS's participation in the *Andrews* litigation against ETSI and the Bureau of Reclamation was *not* genuinely intended by KCS to pursuade the federal courts to rule against ETSI and the Bureau of Reclamation?

Proved _____
Not Proved _____

(D) That KCS's participation before various federal administrative agencies, such as the Bureau of Land Management, the Corps of Engi-

neers, the Environmental Protection Agency, and the United States Forest Service was *not* genuinely intended by KCS to pursuade these agencies to rule against ETSI?

Proved _____
Not Proved _____

(E) That KCS's participation before various state administrative agencies, such as the South Dakota Water Management Board, the Oklahoma Corporation Commission, the Oklahoma Water Resources Board and the Arkansas Department of Pollution Control and Ecology, was *not* genuinely intended by KCS to persuade these agencies to rule against ETSI?

Proved _____
Not Proved _____

(F) That KCS's participation before various local agencies, such as the Yuma County, Colorado Land Use Planning Board, was *not* genuinely intended by KCS to persuade these agencies to rule against ETSI?

Proved _____
Not Proved _____

(If you answer all of the above "not proved," go to Question 7 and check "for defendants," and then go to Question 10 and check "for defendants". If you answer "proved" as to any of the above, proceed to the next question).

* * * *

APPENDIX B

DEFENDANTS' ALTERNATE INTERROGATORY #3

[Submitted by Defendants on March 31, 1988 at charge conference]

Do you find that plaintiff has proved, by a preponderance of the evidence, that KCS's conduct before courts and governmental agencies was *not* genuinely intended to persuade judges and government officials to enter rulings and decisions favorable to KCS and unfavorable to ETSI?

_____ Yes _____ No

Refused, 3/31/88
John B. Jones [signed]

APPENDIX C

Defendants' Proposed Instruction No. 7

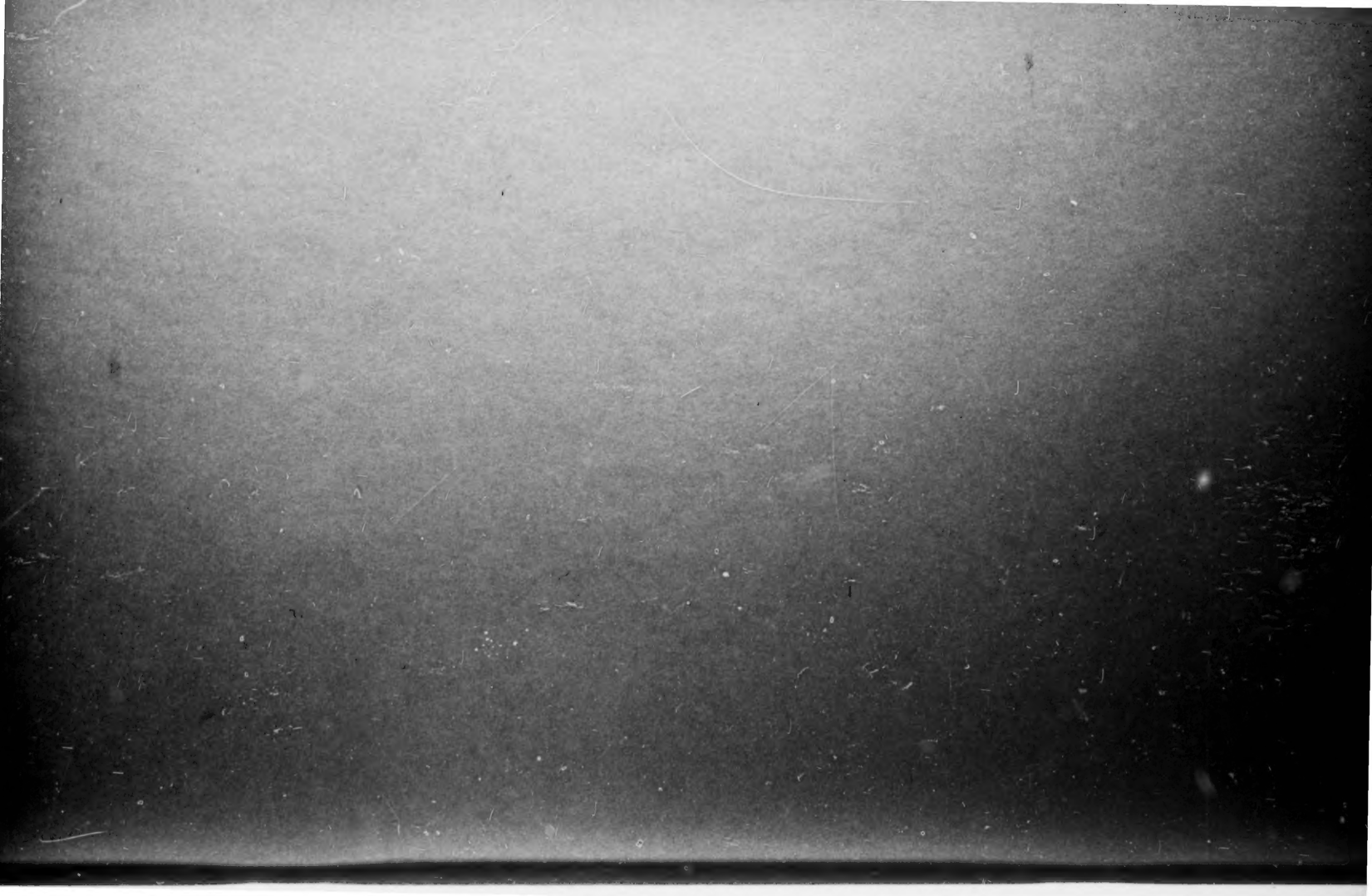
If you find that plaintiffs have not proved that some of defendants' petitioning was "sham", you should thereafter ignore any petitioning conduct as to which plaintiffs have not proved "sham." Such petitioning conduct, as I mentioned earlier, cannot violate the law and cannot be the legal cause of any injury. If you find that plaintiffs have not proved that any of defendants' petitioning conduct was "sham," then you need not consider the matter any further. In short, you must return a verdict for the defendants if you conclude that all of defendants' petitioning was sincerely intended to influence some governmental body.

Refused, 3/31/88
John B. Jones [signed]

Defendants' Proposed Instruction No. 8

If, however, you determine that plaintiffs have proved that some of defendants' petitioning activity was "sham" petitioning, you must go on to determine precisely which instances of petitioning were proved to be "sham" petitioning. If there are any such instances, and I do not by giving you this instruction mean to suggest that I believe there are, then this is the petitioning conduct upon which you should focus for the remainder of your deliberations. Any petitioning conduct that you find to be genuine should not be further considered by you, insofar as plaintiffs' claim of injury is concerned.

Refused, 3/31/88
John B. Jones [signed]



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No. 89-724

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF SOUTH DAKOTA, ET AL.,

Petitioners,

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF NINE STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL.,

Respondents.

BRIEF OF NINE STAT. AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTRODUCTION

The States of Arkansas, Connecticut, Maine, Maryland, North Dakota, Texas, Utah, West Virginia, and Wyoming (hereinafter "Amici States") submit this brief in support of the State of South Dakota's Petition for Writ of Certiorari.

INTEREST OF THE AMICI STATES

The Attorneys General of the Amici States have a strong interest in interpreting the antitrust laws consistent with sound policy, congressional intent and the prior decisions of this Court. The Attorneys General of the Amici States are the chief law enforcement officers of their states, and many are charged with the duty of enforcing state antitrust laws. The state antitrust laws by statute or court decision are often interpreted in conformity with federal law.[1] The Attorneys General also represent their states and political subdivisions in state and federal antitrust actions for damages and

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[1] See, e.g., Tex. Bus. & Com. Code § 15.04 (1989); Connecticut v. Exxon Corp., 1987-1 Trade Cas. CCH ¶ 67,579 (Conn. Super. Ct. 1987).

injunctive relief.[2] In their capacity as parens patriae, they are authorized to bring state and federal actions on behalf of the citizens of their states.[3] Thus, the Court's interpretation in this case will not only directly affect the Amici States' ability to bring antitrust actions in federal court, but will have an impact far beyond the questions of federal law presented.

South Dakota made a sovereign decision to engage in a commercial transaction with one of its most precious resources, water, to enhance water development and delivery of quality water to its citizens. Similarly, many Amici States are involved in a variety

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[2] Georgia v. Evans, 316 U.S. 159 (1942).

[3] 15 U.S.C. § 15(c). See also Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945) (common law parens patriae authority).

of commercial ventures for the benefits of their citizens.[4]

The resolution of whether a sovereign state has standing under the federal anti-trust laws in commercial ventures like South Dakota's is of compelling interest to the Amici States.

The Amici States support the State of South Dakota's contention that the Eighth Circuit's decision in South Dakota v. Kansas City Southern[5] artificially narrows a state's right to pursue actions under Section 4 of the Clayton Act. The Amici States also support South Dakota's contention that the

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[4] See, e.g., NDCC § 6-09-01 (authorizing the Bank of North Dakota) and NDCC § 54-18-02 (authorizing the North Dakota Mill and Elevator).

[5] South Dakota v. Kansas City Southern Industries, 880 F.2d 40 (8th Cir. 1989), petition for cert. filed, (U.S. Nov. 3, 1989), (No. 89-724).

Eighth Circuit decision concerning the sham exception to the Noerr-Pennington doctrine imposes an almost unattainable burden upon a plaintiff to establish a basis of liability for anticompetitive petitioning conduct before courts and administrative agencies.

SUMMARY OF ARGUMENT

1. The Eighth Circuit held that South Dakota lacked the ability to bring an action under Section 4 of the Clayton Act because it was only a "supplier." This holding is contrary to the intent of Congress, inconsistent with this Court's prior decisions and improperly prevents persons who are not direct competitors and purchasers in a restrained market from recovering treble damages for injuries they have suffered at the hands of antitrust violators.

2. The Eighth Circuit improperly applied the sham exception to the Noerr-Pennington doctrine to immunize a

pattern of anticompetitive petitioning conduct as a matter of law based upon partial motivation to prevail on the merits and limited success. This is contrary to this Court's prior decisions and creates an impossible burden of proof. The Eighth Circuit decision also conflicts with holdings of other circuits, including In re Burlington Northern, Inc., infra, a case involving the same petitioning conduct.

ARGUMENT

I

THE CAPACITY TO BRING AN ACTION UNDER § 4 OF THE CLAYTON ACT IS NOT LIMITED TO DIRECT COMPETITORS AND PURCHASERS IN A RESTRAINED MARKET.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides a treble damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." The Eighth Circuit's decision severely weakens this

private right of action. The decision effectively prohibits participants, other than direct competitors and purchasers in a restrained market, from pursuing actions under § 4 to enforce the antitrust laws and seek relief from injuries suffered. Such a restrictive interpretation of the availability of this antitrust remedy is inconsistent with the intent of Congress.

This Court has stated:

> "[o]n its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.

Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982), (quoting from Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)).

Given this expression of congressional intent, this Court has refused to engraft artificial limitations on this remedy. The Court has recognized that § 4 is not confined to consumers, to purchasers, to competitors, or to sellers. It is comprehensive in its terms and coverage, protecting all who are victims of the forbidden practices. McCready, 457 U.S. at 472.

In this case, it is clear that South Dakota, as a participant in the coal transportation market, was acting in both sovereign and proprietary capacities. As such, it had greater interests to preserve competition and pursue antitrust violations than all other private participants, except Energy Transportation System Inc., the prospective direct competitor. South Dakota's sovereign acts should strengthen its argument for antitrust standing. This issue

of sovereignty was totally ignored by the Eighth Circuit.

Consistent with the Court's refusal to engraft artificial limitations, this Court in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535-536 (1983) rejected the lower courts' application of various black-letter rules of law and labels in determining a party's ability to pursue an action under § 4. The Court went on to hold that the determination of whether a person could avail himself of this remedy required an analysis of the factors set forth in previous antitrust decisions. Associated General, 459 U.S. at 536-545. The factors to be weighed are:

1. The causal connection between the alleged antitrust violation and the harm to the Plaintiff;

2. The existence of improper motive;

3. Whether the injury was the type that Congress sought to redress with the antitrust laws;

4. The directness of the connection between the injury and the alleged restraint in the relevant markets;

5. The speculative nature of the damages; and

6. The risk of duplicative recoveries or complex apportionment of damages.

Id. at 537-545.

When the Eighth Circuit denied South Dakota's standing, it not only decided the antitrust standing issue in a manner contrary to congressional intent, but it also misapplied clear precedent from this Court. Rather than applying the appropriate factors, the Eighth Circuit relied upon its determination that South Dakota was an ordinary supplier and, as such, could not have the ability to pursue a § 4 action. South Dakota v. Kansas City Southern, 880 F.2d at 46-48.

Misapplication of antitrust standing analysis is not limited to the Eighth Circuit. Other circuits have used labels and black-letter rules to restrict the availability of the § 4 remedy.[6]

By granting South Dakota's Petition for Certiorari, this Court would have an opportunity to correct this misapplication of precedent. The Court would also be able to analyze the availability of § 4 in circumstances in which a party performs sovereign and proprietary functions.

- II

THE EIGHTH CIRCUIT DECISION IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND CONSTITUTES AN UNWARRANTED EXPANSION OF IMMUNITY UNDER THE NOERR-PENNINGTON DOCTRINE.

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[6] See, e.g., Eagle v. Star-Kist Foods, Inc., 812 F.2d 538 (9th Cir. 1987); Gregory Marketing Corp. v. Wakefern Food Corp., 787 F.2d 92 (3d Cir.), cert. denied, 479 U.S. 821 (1986); Bell v. Dow Chemical Co., 847 F.2d 1179 (5th Cir. 1988).

The extent that the petitioning of government officials is protected from liability is one of great controversy. The protection provided for petitioning activity, which is discussed under the Noerr-Pennington doctrine, applies to many actions besides antitrust.[7] It embodies both statutory and constitutional considerations.

The scope of the Noerr-Pennington doctrine is a center of heated debate. In an apparent effort to provide guidance to lower courts, this Court in Allied Tube & Conduit Corp. v. Indian Head, Inc., ___ U.S. ___, 108 S.Ct. 1931 (1988), addressed the

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[7]The doctrine is used to describe this Court's rulings in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), that certain petitioning of government officials is immune from scrutiny under the antitrust laws and other laws regulating commercial behavior.

applicability of the Noerr-Pennington doctrine in a "legislative" setting. There, the Court determined that the immunity provided by the doctrine is not absolute and depends upon the "source, context and nature of the anticompetitive restraint at issue." Allied Tube, 108 S.Ct. at 1937. There are no talismanic indicators of immunity; all circumstances surrounding the petitioning activity must be examined.

Despite this guidance, the controversy over the scope of Noerr-Pennington doctrine continues. An area of great dispute is the applicability of the sham exception. Under this exception, private action that is not generally aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. Such activity is not protected from immunity. See Allied Tube, 108 S.Ct. at 1937 n.4. Although this Court has addressed

the issue of what constitutes sham in several decisions, it has not reviewed a sham petitioning action following a jury verdict.[8] Lower courts have developed varying legal theories on what constitutes sham petitioning activity. This has resulted in conflicting determinations of when petitioning activity is a sham and subject to liability.[9]

There is no clearer evidence of conflicting determinations than the Eighth

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[8] See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

[9] See, e.g., Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386 (9th Cir. 1983); Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983) (conflicting theories on motivation); Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984); Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc., 814 F.2d 358 (7th Cir. 1987) (conflicting theories on the conclusiveness of success).

Circuit's decision in this case and the Fifth Circuit's decision in In re Burlington Northern, Inc., 822 F.2d 518 (5th Cir. 1987), cert. denied, 484 U.S. 1007 (1988). In South Dakota v. Kansas City Southern, the Eighth Circuit determined as a matter of law, contrary to the jury's finding, that the petitioning conduct was not a sham and protected from liability. The lower court concluded that, despite the presence of a comprehensive scheme to utilize state and federal courts and administrative agencies for anticompetitive purposes, Kansas City Southern was protected due to the partial success in the Andrews litigation[10] and that Kansas City Southern was motivated at least

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[10] Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984), aff'd, 787 F.2d 270 (8th Cir. 1986), aff'd sub nom. ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988).

in part by a "desire to prevail on the merits." 880 F.2d at 50-54. In contrast, the Fifth Circuit, in reviewing the identical petitioning activity, determined that this activity could constitute a sham given the lack of success and the intent to cause direct injury through delay and uncertainty. In re Burlington Northern, Inc., 822 F.2d at 526-533.

The Attorneys General of the Amici States have compelling interests to prevent unwarranted expansion of immunity from anticompetitive conduct and to prevent their judicial and administrative processes from being used to inflict commercial injury through delay and uncertainty.

The Eighth Circuit decision inhibits these interests. Through South Dakota v. Kansas City Southern, the Eighth Circuit imposes what is an almost impossible burden on a plaintiff to establish sham petitioning

activity. The Eighth Circuit rejected the holding of other circuits that mixed motive petitioning activity can constitute a sham despite success on the merits. See, e.g., In re Burlington Northern, Inc., supra; Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983).

The granting of South Dakota's Petition for Certiorari will allow this Court to address what constitutes sham activity in the context of a jury issue. Judicial review by this Court is necessary to establish consistency among lower courts concerning this judicially created doctrine.

CONCLUSION

For the foregoing reasons, the Amici States urge this Court to grant the State of

South Dakota's Petition for Writ of Certiorari.

DATED: December 1, 1989

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No. 89-724

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF

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1. *The Special Status of a Sovereign State*

KCS does not dispute the extraordinary involvement of South Dakota in the ETSI project, all of the many steps the State took to preserve and extend the project, or the detailed recitation in the Petition of what KCS did to defeat the project by engaging in a group boycott and a pattern of abusing judicial and administrative processes in federal, state and local forums.

Instead, KCS argues that there is no statutory foundation and no previous authority to support "a new rule of law" that gives special status to a state plaintiff.

Brief in Opposition ("Oppcert") 7. The statement is correct, but irrelevant. South Dakota has never claimed that States generally should enjoy a special exemption from the normal rules of standing; it claims only that the lower court should not have ignored those special circumstances in this case that distinguish South Dakota from the ordinary commercial supplier.

South Dakota's sovereign status was not important because of some *parens patriae* claim but rather because certain sovereign acts were necessary to create competition in the coal transportation market, because the State's acts were performed to allow it to act more efficiently in its proprietary capacity, and because KCS, recognizing this, directly attacked the State in its sovereign capacity.

This Court is not precluded from holding that South Dakota's status is important for a standing determination in this case simply because the precise issue was not addressed in the statutory language or in congressional debates. The six standing tests set out in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), were not specifically sanctioned by Congress either. Moreover, when this Court listed those six factors, it surely did not mean to suggest that lower courts should entirely ignore other factors that might be important in other cases, as the court below did.

South Dakota therefore does not ask for "a new construction" of the private antitrust remedy, as KCS suggests. Oppcert 9.[1] It simply seeks a reasonable application or extension of the *Associated General Contractors*

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[1] Neither does South Dakota express "unhappiness with the level and focus of federal antitrust enforcement." Oppcert 9. The limits of federal enforcement are simply facts, and there has been increasing public discussion of the need to supplement federal efforts. See, *e.g.*, Reports on Seminars conducted by FTC and D.C. Bar Ass'n, 57 ATTRR 819, 820, 822 (Dec. 14, 1989).

tests to accommodate a situation not contemplated in that decision.

2. *The Need to Balance All Relevant Standing Factors*

South Dakota pointed out that the lower court erroneously treated a single issue—participation in the market—as decisive. KCS responds: "South Dakota has markedly mischaracterized the decision below. South Dakota can cite no portion of the decision showing that the Court gave any single factor decisive effect, because the Court did nothing of the sort." Oppcert 10. But when KCS itself then turns to the Court of Appeals' treatment of *Associated General Contractors*' six factors, it argues: the court assumed that the first two "weighed in South Dakota's favor," Oppcert 11; the court "suggest[ed]" that the last two "weighed in KCS' favor," Oppcert 11-12; and so the court "focused" on the remaining two. Oppcert 12. Ignoring one of these remaining two entirely, KCS then says the panel decided that the State's lack of participation in the coal transportation market "necessarily became an important factor." Oppcert 13. Thus, KCS's own recitation shows that this factor was not just important but decisive, which was precisely South Dakota's point.

The lower court decided, in KCS's own words, that "South Dakota was in no different position than any other prospective supplier of inputs to ETSI, *e.g.*, pipe suppliers, banks or labor unions." Oppcert 12-13. But South Dakota was not just another supplier which was indirectly hurt by shots fired in another direction; South Dakota was the direct target of some of the heaviest salvos fired against competition. The lower court entirely ignored this crucial fact because it focused only on the question of South Dakota's actual presence as a competitor, contrary to the mandate of *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 472 (1982). The harm to South Dakota was a result of injury not merely to a

competitor but to competition, and this harm was neither speculative nor duplicative.[2]

The lower court further compounded its error by finding that a contract cancellation prompted by illegal activity can cause no antitrust injury if the contract hypothetically might have been cancelled for another reason. App. 19a. KCS does not even attempt to defend this absurd conclusion.

3. *The Need to Look at the Petitioning Activities as a Whole and Give Appropriate Deference to the Jury's Findings*

As outlined in the Petition, Pet. 5-8, KCS here engaged in a campaign for over ten years to destroy potential competition from a coal slurry pipeline. In combination with other railroads, KCS resisted the grant of crossing rights for the purpose of delay, sought to complicate the process of environmental review, challenged the grant of routine permits, filed a lawsuit (the *Andrews* case) to deprive the pipeline of the water needed for its operation, and engaged in a pattern of other petitioning activity that abused judicial and administrative remedies.

The jury heard evidence on all this. It was specifically instructed that KCS could not be liable for its litigation activities if those activities genuinely sought relief, rather than delay, and this instruction has never been challenged by KCS.

Instead, KCS makes the extraordinary argument that because the jury was not asked a specific *question* about

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[2] Neither ETSI nor the utilities could recover on South Dakota's behalf. ETSI was seeking lost profits. The payments to South Dakota were a *reduction* in ETSI's damages and were not considered by the utilities at all, since they were seeking to recover only the increased costs of transportation. The jury calculated the present value of the contract payments, which is far simpler and less speculative than most damage determinations.

sham litigation, it did not decide there had been any. South Dakota set forth in Appendix H of its Petition some of the instructions given to the jury. The jury was told, for example, that "Plaintiff *must prove* that defendant's and other conspirators' involvement in administrative proceedings and litigation concerning the ETSI project were a shame or a pretext *before* those activties *may be found* to have been in violation of the federal antitrust laws." App. 72a (emphasis added). Moreover, "sham" and "pretext" were extensively defined. App. 71a-72a. The jury found the defendants liable for antitrust violations. To ignore these instructions and this finding and to argue that the jury did *not* find KCS's activities to be a sham or a pretext is to assume that the jury totally disregarded the charge given it by the court. This would be tantamount to arguing that the jury did not find a conspiracy because it was not specifically asked which entities formed the conspiracy.

Moreover, KCS suggests that the District Court and South Dakota precluded a review of each individual petitioning activity by rejecting special interrogatories. Oppcert 25-26. The lower court found no error in the District Court's instructions. In addition, KCS' requested interrogatories dismembering the petitioning activities would have been contrary both to *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) and to this Court's analysis in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962).[3] The fragmented view, condemned in *Continental Ore* and *California Motor*, is precisely the approach followed by the lower court and defended by KCS in this case. Here, the lower court found first, "as a matter of law," that

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[3] "* * * [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . '[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole,' " quoting *United States* v. *Patten*, 226 U.S. 525, 544 (1913).

KCS's activities outside the *Andrews* litigation "had no significant or proximate causal relation to the cancellation" of South Dakota's water supply contract. App. 27a. Neither the court below nor KCS has made any effort to justify that conclusion with anything in the record. An appellate court is not barred from reviewing the sufficiency of evidence, but a bare assertion is not a review.

The lower court's opinion stated that only "one-third of [KCS's] administrative actions * * * were directly related to the *Andrews* litigation." App. 25a. Two points should be noted. First, it certainly was not unreasonable as a matter of law for the jury to find that KCS's overall campaign of obstruction and delay was responsible for cancellation of the ETSI agreement, not just the *Andrews* decision standing alone. In *Andrews* this Court, after all, assumed that water was available in the Oahe Reservoir for industrial purposes; the only thing standing in the way of its use was a ministerial act, namely the specific approval of the Secretary of the Army.

> The Army Secretary might have [disposed of Lake Oahe water] but has not done so.
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> * * * *
>
> Certainly if the Executive Branch as a whole wishes to put the water in this reservoir to beneficial use, it may do so simply by complying with the terms of the Act. [*ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 506, 509 n.5 (1988).]

Second, even the recitation by the Court of Appeals demonstrates that fully two-thirds of KCS's actions were not *Andrews*-related. This two-thirds was not examined at all by the court, and the bulk of the evidence which formed the basis for the jury's verdict was thus simply ignored.[4]

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[4] KCS's defense of the lower court is relegated to two sentences in a footnote, Oppcert 24 n.23. KCS argues that the court below did not address KCS's post-1981 non-*Andrews* activity because of the court's *ipse dixit* that this activity had no relationship to South Dakota's injury. The jury found to the contrary.

KCS concedes that the "express basis" for the lower court's holding on *Noerr-Pennington* was "KCS' subjective intent." Oppcert 22. But surely if that is the issue, as we agree that it was, the province of the jury was invaded when the Court of Appeals undertook to decide this issue for itself.

After it had cavalierly disposed of the jury's findings, the lower court went on to say that even if KCS's activities outside the *Andrews* litigation "did contribute to the concellation" of the contract, it does not matter because the *Andrews* litigation was protected by the *Noerr-Pennington* rule. App. at 27a. This is a total *non sequitur*, and once again KCS makes no effort to defend it.

4. *The Conflict with Other Decisions*

KCS attempts to distinguish *In re Burlington Northern*.[5] That was a lawsuit against KCS and four other railroads and their parents. One of the issues was whether the very conduct under review here constituted sham. In ruling on discovery matters, the Fifth Circuit stated: "We reject * * * the railroads' contention that the district court is precluded from finding sham by the railroads' partial success in one of the lawsuits [*Andrews*] and their defensive posture in the other lawsuits." 822 F.2d at 521. The reason, the court said (citing a number of authorities), was that "[i]f the defendant's intent was not to influence the government and obtain relief, but rather to harm a competitor through the mere invocation and maintenance of the process, he is not entitled to protection because he is not exercising the right of petition that formed the basis for the decision in *Noerr*." *Id.* at 527. Thus, "success on the merits does not necessarily preclude an antitrust plaintiff from proving that defendant's earlier litigation activities were

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[5] 822 F.2d 518 (5th Cir. 1987), *cert. denied sub nom. Union Pacific R.R.* v. *Energy Transp. Systems, Inc.*, 484 U.S. 1007 (1988).

a sham." *Id.* at 528. This ruling would be inconsistent with that of the court below even if it related to some other set of activities; but in fact that the Fifth Circuit had under review precisely the same activities at issue here. Thus, the Fifth Circuit held that success in *Andrews* did not eliminate the possibility of sham, the Eighth Circuit held that success was the determinative factor in disproving sham, and the conflict could not be more clear.[6]

KCS also attempts to distinguish *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 108 S. Ct. 1931 (1988). Petitioner need not instruct this Court, of course, on the teaching of that case. We would simply point out that we have correctly recited what the opinion stated, and what we quoted was *not* in the portion of the opinion that discussed petitioning private parties but in the portion that discussed governmental entities. *Allied Tube*, therefore, is precisely relevant.[7]

5. *Conclusion*

No amount of legal sophistry can obscure the fact that a once-in-a-lifetime opportunity for a small rural State to develop water resources for all its citizens was cut off by KCS's pattern of anticompetitive conduct. A jury so found. If ever a party had standing to attack these antitrust violations, it is the sovereign State of South Dakota. And as demonstrated by the amicus brief filed

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[6] In addition, it should be noted again that if the key is KCS's "intent," as the Fifth Circuit said in *Burlington Northern*, that is a quintessential jury question, and this jury decided it against KCS.

[7] The opinion in that case states repeatedly that the *Noerr* determination requires a court to consider "the context and nature" of the challenged activities. 108 S. Ct. at 1939, 1940, 1941. KCS distinguishes the case solely because the contexts of the activities were different, and ignores this Court's instruction to consider the nature of the activities as well, which in this case was litigation, not lobbying.

by nine States supporting the grant of certiorari in this case, the issues here are of major concern far beyond the boundaries of South Dakota.

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